VICTIM PARTICIPATION BEFORE THE INTERNATIONAL CRIMINAL COURT

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Erstgutachter: Prof. Dr. Gerhard Werle

Zweitgutachter: Prof. Dr. Florian Jeßberger

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Table of Contents

CHAPTER 1 - Foundations

A. Introduction

Through the adoption of the Statute of the International Criminal Court (ICC) on 17 July 1998 in Rome[1] the first ever permanent, treaty based, international criminal court was created. The Rome Statute ("Statute") then entered into force on 1 July 2002. This creation marks a striking development in international criminal law.

The international community had already explored the possibility of establishing a permanent international criminal court in the aftermath of the World War II trials.[2] However, for decades thereafter no permanent international criminal tribunal was in fact established.[3]

The Rome Statute has been praised for many of its features, including the fact that it takes victims' rights into account to an extent which was unprecedented up to that point.[4] Some

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[1] See UN Doc. A/CONF.183/9; http://documents-dds-ny.un.org/doc/UNDOC/GEN/N98/281/44/img/N9828144.pdf?OpenElement.

[2] The idea had indeed already been discussed shortly after end of World War I when the Allied Powers sought to prosecute Kaiser Wilhelm II and members of the German armed forces before a special tribunal, see **Harrington**, **J.**, **Milde**, **Michael** and **R. Vernon**, (2006). Introduction. Bringing power to justice? : the prospects of the International Criminal Court. J. Harrington. Montréal, McGill-Queen's University press: pp. 1 et seq. At page 3.

[3] On these and other efforts to create a permanent court see e.g. **Morris**, **V.** and **M. P. Scharf** (1998). The International Criminal Tribunal for Rwanda. Irvington on Hudson, Transnational Publishers. At pages 17-37; **Ferencz**, **B.** (1980). An International Criminal Court. A Step Toward World Peace - A Documentary History and Analysis. New York, Dobbs Ferry. Pp 26 et seq; **Cassese**, **A.** (2003). International Criminal Law. Oxford, Oxford University Press. at page 327; see also **Bassiouni**, **C.**, (1995). Das „Vermächtnis von Nürnberg": eine historische Bewertung fünzig Jahre danach. Strafgerichte gegen Menschheitsverbrechen: zum Völkerstrafrecht 50 Jahre nach den Nürnberger Prozessen. Hankel, G. and G. Stuby. Hamburg, Hamburg Edition. At pages 15 et seq.

[4] See for instance **Fernández de Gurmendi**, **S. A.** (2001). Definition of Victims and General Principles. The International Criminal Court, Elements of Crimes and Rules of Procedure and Evidence. R. S. Lee. Ardsley, New York, Transnational Publishers Inc.**:** 427-434. At page 427; **Lagodny**, **O.** (2001). "Legitimation und Bedeutung des Internationalen Strafgerichtshofes." Zeitschrift für die gesamte Strafrechtswissenschaft **113**(4): 800-826. At page 814; **van Boven**, **T.** (1999). The Position of the Victims in the Statute of the International Criminal Court. Reflections on the International Criminal Court, Essays in Honour of Adrian Boos. H. von Hebel, J. G. Lammers and J. Schukking. The Hague, TMS Asser Press**:** 77-89. At page 77; **Jones**, **J. R. W. D.** (2002). Protection of Victims and Witnesses.

refer to the Rome Statute as a "milestone in the development of victim protection and participation"[5], the Statute has also been termed "victim-centered"[6] and to be a major innovation.[7]

The Rome Statute thus picks up on a trend that has emerged in national law and politics over a longer period, that is, a shift of paradigm focus of criminal law on the accused to a focus on victims.[8] The rights of victims in criminal proceedings have developed all over the world in the last decades, numerous national jurisdictions provide for victim participation in domestic criminal proceedings, albeit to varying degrees.[9]

The Rome Statute of the International Criminal Court, A Commentary. A. Cassese, P. Gaeta and J. R. W. D. Jones. Oxford, Oxford University Press. **2:** 1355-1370. At page 1357; **Brady**, **H.** (2001). Protective and Special Measures for Victims and Witnesses. The International Criminal Court, Elements of Crimes and Rules of Procedure and Evidence. R. S. Lee. Ardsley, New York, Transnational Publishers**:** 434-456. At page 434; **Bassiouni**, **M. C.** (2006). "International Recognition of Victims' Rights." Human Rights Law Review **6**(2): 203-279. At page 230; **Bitti**, **G.** and **G. González Rivas** (2006). The Reparations Provisions for Victims Under the Rome Statute of the International Criminal Court. Redressing Injustice through Mass Claims Processes: Innovative Solutions to Unique Challenges. Oxford**:** 299-322. At page 299; **Cassese**, **A.** (1999). "The Statute of the International Criminal Court: Some Preliminary Reflections." European Journal of Crime, Criminal Law and Criminal Justice(10): 144-171. At page 167; **Roggemann**, **H.** (1998). Die Internationalen Strafgerichtshöfe, Ergänzungsband: Das Statut von Rom für den Ständigen Internationalen Strafgerichtshof. Berlin, Berlin Verlag. At page 21 refering to Art. 75; **Pejic**, **J.** (2000). "The International Criminal Court Statute: An Appraisal of the Rome Statute." The International Lawyer **34**(1): 65-84. At page 79.

[5] See for instance **Jorda**, **C.** and **J. de Hemptienne** (2002). The Status and Role of the Victim. The Rome Statute of the International Criminal Court, A Commentary. A. Cassese, P. Gaeta and J. R. W. D. Jones. Oxford, Oxford University Press. **2:** 1387-1419. At page 1388; **Bassiouni**, **M. C.** (2005). The Legislative History of the International Criminal Court: Introduction, Analsysis and Integrated Texts. Ardsley, New York, Transnational Publishers. At page 177; **Piragoff**, **D. K.** (2001). Procedural Justice Related to Crimes of Sexual Violence. International and National Prosecution of Crimes Under International Law. H. Fischer, C. Kreß and S. R. Lüder. Berlin, Berlin Verlag**:** 385-421. At page 385.

[6] See **Bassiouni**, **M. C.** (1999). International Criminal Law, Vol.1: Crimes. Ardsley.At page 528; **Stehle**, **S.** (2006). Das Strafverfahren als immaterielle Wiedergutmachung. Frankfurt am Main. At page 35.

[7] See **Victims Rights Working Group**, Victim participation at the International Criminal Court: Summary of issues and recommendations 1 (2003); similarly see **Di Giovanni, A.** (2006). "The Prospect of ICC Reparations in the case concerning Norther Uganda: On a collision course with Incoherence?" Journal of International Law and International Religion **2**(2):25-40.At page 26.

[8] See **Hassemer**, **W.** and **J. P. Reemtsma** (2002). Verbrechensopfer. Gesetz und Gerechtigkeit. München, C.H. Beck. At page 13; similarly for the international context **Schabas**, **W. A.** (2004). An Introduction to the International Criminal Court. Cambridge, Cambridge University Press. Pp 146 et seq.

[9] See **Jorda**, **C.** and **J. de Hemptienne** (2002). The Status and Role of the Victim. The Rome Statute of the International Criminal Court, A Commentary. A. Cassese, P. Gaeta and J. R. W. D. Jones. Oxford, Oxford University Press. **2:** 1387-1419. pp 1401 et seq.; for a comparative overview of victims' rights in European Criminal Systems see **Brienen**, **M. E. I.** and **E. Hoegen** (2000). Systems the implementation

The ICC also states on its official website that one of the great innovations of the Statute of the ICC and its Rules of Procedure and Evidence (RPE) was the series of rights granted to victims.[10]

B. Aims, Methodology and Structure of the Study

But to which extent does the Rome Statute really provide an instrument that gives victim a new and satisfactory role in international criminal proceedings?

This study will examine the position of victims in international criminal law[11], especially their rights to participate in the proceedings and explore the extent to which the reality lives up to the positive image of the ICC in press and media.

"Victim participation" in this context refers to the right of victims to participate in the proceedings in their capacity as victims, the term does not refer to witness testimony.

In its examination of the general area of victim participation, this study will deal with a number of specific key issues.

First, the underlying objectives of allowing victim participation shall be elucidated when discussing the question of how exactly victim participation is to be achieved before the ICC. Second, the extent to which such participation corresponds to the needs and wishes of victims will be assessed. The various options and features provided for by the Rome Statute will be discussed as well whether the ICC, as a criminal court, can ever be an adequate instrument for the realisation of victims' rights. Finally, the analysis of victims' participatory rights before the ICC will be conducted with a view to possible improvements in the current provisions but also in order to show where alternative solutions might prove useful.

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of Recommendation (85) 11 of the Council of Europe on the Position if the Victims in the Framework of Criminal Law and Procedure, Wolf Legal Productions.

[10] See http://www.icc-cpi.int/.

[11] Concentrating mainly on the ICC.

Despite its importance to the issue of victims' rights, the related subject of reparations will not be dealt with in this work as the topic would then become too broad. The author would like to refer readers to a recent study on reparations.[12]

In the present Chapter the author will commence by presenting the basic "tools" of the study. The rules of interpretation in international criminal law will be explored in some detail.

In Chapter 2 the author will continue by delineating the historical, political and legal processes which eventually led to the creation of the Statute of Rome. It will further be explored to which extent the role of victims was considered in the provisions of the International Military Tribunals of Nuremberg and Tokyo, the International Tribunals for the former Yugoslavia and Rwanda, the Special Court for Sierra Leone and the Extraordinary Chambers of the Court of Cambodia. This is important, as only with an understanding of this historical development it is possible to see the full extent of developments in this field of law and whether the Statute has in fact set new standards for international criminal law.

Once the historical development of victims' participatory rights in international law has been outlined, a significant proportion of this study will focus on the position of victims as provided for by the legal instruments of the ICC. This will involve a detailed interpretation of the Statute and Rules in Chapter 3 and Chapter 4. Research on this topic so far has mostly been limited to a description of the existing rules without providing in-depth analyses.[13]

The interpretation will thus contribute to clarifying the provisions' content and their systematization. On the basis of the ICC's initial decisions on the topic, it is possible to

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[12] See **Dwertmann, Eva**, The Reparations System of the International Criminal Court, its implementiation, possibilities and limitations, forthcoming.

[13] See similarly **Stahn**, **C.**, **H. Olasolo**, et al. (2006). "Participation of Victims in Pre-Trial Proceedings of the ICC." Journal of International Criminal Justice **4**(1): 219-238. At page 225.

gain a rough idea of which road the ICC will follow. In this regard I have attempted to take into account all relevant material, including case law, up to 8 February 2009.

In order to be able to extensively interpret the provisions it will first of all be necessary to research the objectives of the ICC, the aims and purposes of the provisions in general and of victim participation in particular. These objectives will be contrasted with a survey on victims' needs.

Next, the notion of "victim" as a precondition for participation will be clarified and followed by a detailed analysis and evaluation of the ICC's provisions on victim participation. The extent to which provisions for the benefit of victims will and can be effective and far-reaching without conflicting with the rights of other participants in the proceedings will also be discussed.

In the final Chapters the author will debate the extent to which the ICC, as a criminal court, can and will at all help victims to overcome the consequences of war crimes. It will also be reflected on some possible alternatives.

C. Sources of Law

A fundamental question of any discussion of international criminal law is always which legal sources are applicable to the area. This question will be discussed here only insofar as is necessary to lay the foundations for discussion of the main topic.

A general answer to the question of sources is provided by Art. 38 of the Statute of the International Court of Justice. The Rome Statute creates a special regime.[14] Art. 21 of the Statute sets out the legal sources upon which the ICC may draw.

Art. 21 establishes a hierarchy of applicable law. According to Art. 21(1)(a) the Statute, the Elements of Crime, and the Rules of Procedure and Evidence ("RPE") are the primary

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[14] **Schabas**, **W. A.** (2004). An Introduction to the International Criminal Court. Cambridge, Cambridge University Press. At page 72.

sources to be applied by the Court. At the same time the Statute prevails over the Rules and Regulations.[15]

According to Art. 21(1)(b), the Court shall in the second place apply "where appropriate" applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict. The wording of Art. 21(1)(b) is not as unequivocal as the wording of Art. 21(1)(a). It seems to be clear that the wording covers international treaties[16] but it is not necessarily clear what else is covered. The phrase "principles of international law" suggests that such principles are included that are not connected with national law, that derive from the international legal conscience.[17] "Rules of international law" comprises primarily customary international law[18], but not general principles of law.[19]

Lit (c) provides that "failing that, general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards". This was the most controversial part of Art. 21 – it was the result of a compromise between delegates who argued that the Court should apply national laws directly and those who believe that "general principles" ought to be entirely divorced from any reference to particular national systems.[20]

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[15] See Art. 51(4) Rome Statute: "..the RPE, amendments thereto and any provisional Rule shall be consistent with this Statute".

[16] The ICC Statute as main source in international criminal law itself is a multilateral international treaty.

[17] **McAuliffe deGuzman**, **M.** (1999). Art. 21, Applicable Law. Commentary on the Rome Statute of the International Criminal Court. Observers´Notes Article by Article. O. Triffterer. Baden-Baden, Nomos Verlagsgesellschaft. At page 441.

[18] Ibid., at page 442; **Werle**, **G.** (2005). Principles of International Criminal Law. The Hague, TMC Asser Press. At page 57; **Schabas**, **W. A.** (2004). An Introduction to the International Criminal Court. Cambridge, Cambridge University Press. At Page 73.

[19] **Pellet**, **A.** (2002). Applicable Law. The Rome Statute of the International Criminal Court: A Commentary. A. Cassese, P. Gaeta and J. R. W. D. Jones. Oxford, Oxford University Press**:** 1051-1084. at page 1072.

[20] **McAuliffe deGuzman**, **M.** (1999). Art. 21, Applicable Law. Commentary on the Rome Statute of the International Criminal Court. Observers´Notes Article by Article. O. Triffterer. Baden-Baden, Nomos

Now, only in cases where the ICC and other treaties as well as customary law prove unhelpful does Art. 21 allow references to national law. Art. 21(1)(c) requires the ICC judges to apply not the national laws of any particular state, but rather, the principles underlying the laws of "the legal systems of the world".[21] The language of Art. 21 leaves a great deal of discretion to the judges in determining which national laws to consider in deriving "general principles".

It seems clear that an applicable principle need not be accepted unanimously by all the world's legal systems. Rather, "there must be evidence that it is applied by a representative majority", including the world's principal legal systems. In identifying general principles, therefore, the judges of the ICC will be required to engage in comparative law analysis.[22] This rule enhances the role of comparative criminal law and corresponds, in practice, to what international judges already do before the *ad hoc* tribunals.[23] In this process particular emphasis is placed on the laws of states that "would normally exercise jurisdiction over the crime".

However, the application of Art. 21(1)(c) inheres the danger that judges take refuge too swiftly in comparative techniques which can be subject of criticism. ICTY judges Vohrah

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Verlagsgesellschaft. At page 443. **Pellet**, **A.** (2002). Applicable Law. The Rome Statute of the International Criminal Court: A Commentary. A. Cassese, P. Gaeta and J. R. W. D. Jones. Oxford, Oxford University Press: 1051-1084. Pp. 1074 et seq.

[21] **McAuliffe deGuzman**, **M.** (1999). Art. 21, Applicable Law. Commentary on the Rome Statute of the International Criminal Court. Observers´Notes Article by Article. O. Triffterer. Baden-Baden, Nomos Verlagsgesellschaft. At page 443. **Pellet**, **A.** (2002). Applicable Law. The Rome Statute of the International Criminal Court: A Commentary. A. Cassese, P. Gaeta and J. R. W. D. Jones. Oxford, Oxford University Press: 1051-1084. Pp. 1074 et seq.

[22] **McAuliffe deGuzman**, **M.** (1999). Art. 21, Applicable Law. Commentary on the Rome Statute of the International Criminal Court. Observers´Notes Article by Article. O. Triffterer. Baden-Baden, Nomos Verlagsgesellschaft. At page 444; see similarly the Prosecutor, Situation in the Democratic Republic of the Congo, Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision denying Leave to Appeal of 24 April 2006, No. ICC-01/04-141, paras. 16 et seq. stating that Art. 21(c) does not require an exhaustive inquiry into every legal system of the world but rather to ensure by "polling" that the norms in question are effectively found in the "principal legal systems of the world", which could probably be reduced to "civil law, common law, and perhaps Islamic law". The principle of interpretation was that a survey of jurisdictions representing the main legal systems should result in the identification of a common rule or set of rules, i.e. the survey showed a degree of comparative equivalence sufficient to ensure a broad consensus.

[23] **Schabas**, **W. A.** (2004). An Introduction to the International Criminal Court. Cambridge, Cambridge University Press. At page 73.

and McDonald have already stressed that no credence can be given to national legal authorities if they do not accord with the spirit, object and purpose of the Statue and the Rules, thus accentuating the specificity of the international context.[24]

Comparative techniques can be problematical insofar as they are frequently used in a hesitant, unsystematic or simplified manner. As it is not usually possible to consult a representative number of cases, solutions can be pragmatic and can differ from case to case. It can happen that judges stick to the model of law of their country of origin which can lead to the predominance of certain systems.[25]

As regards the ICC the fact that many provisions reflect compromises between different national legal systems must also be taken into account. In interpreting the ICC's provisions therefore, it is not helpful to cite one national example or another.

Art. 21(2) of the ICC Statute clearly rejects the strict reliance on the system of precedent (*stare decisis*) common to Anglo-American law. The Court may, but does not have to, rely on its earlier decisions. Thus, decisions of the Court have no future binding effect in the strict sense.[26]

D. Interpretation of legal sources

The Rome Statute and the Rules are almost completely silent on the question of how to interpret legal sources. Only Art. 21(3) provides that the interpretation of law must be

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[24] **Prosecutor v. Erdemovic**, Joint separate opinion of Judge McDonald and Judge Vohrah, ICTY Case No. IT-96-22, 7 October 1997, para. 5.

[25] **Delmas-Marty**, **M.** (2006). "Interactions between national and International Criminal Law in the Preliminary Phase at the ICC." Journal of International Criminal Justice **4**(1): 2-11. At page 3; see also **Raimondo**, **F.** (2004). Les Principes Généraux De Droit Dans La Jurisdiction Des Tribunaux Ad Hoc. Une Approche Fonctionelle in:

L'expérience des tribunaux pénaux sources du droit internationaux. Paris, Société de Législation Comparée**:** 75-95.Pp 93 et seq.

[26] See **Werle**, **G.** (2005). Principles of International Criminal Law. The Hague, TMC Asser Press. At page 57; **Heikkilä**, **M.** (2004). International criminal tribunals and victims of crimes. Turku, Institute for Human Rights, Abo Akademi University. At page 12.

consistent with internationally recognized human rights and be without any adverse distinction founded on grounds such as gender, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status.

Apart from this, the governing principles of interpretation for the ICC Statute are those contained in Arts. 31 and 32 of the Vienna Convention on the Law of Treaties of 23 May 1969 since the ICC is itself an international treaty. Thus the provisions are to be interpreted in the first instance terminologically. Thereafter, the context and the teleology of the provisions must be examined.[27] In using these techniques a treaty must be interpreted in accordance with the principle of good faith, that is seeking an interpretation that is not absurd or unreasonable.[28] Historical interpretation[29] is, according to Art. 32 of the Vienna Convention, only secondary to the other types of interpretation.

The starting point is thus the ordinary interpretation of the treaty from the point of view of an objective observer.[30] Thereafter, the context of the provision has to be examined, the system of rules of which it is a part and the overall context of the entire treaty. What is relevant to the overall context is, for example, the whole text of the treaty, including the preamble and annexes, and the instruments attached to the treaty.[31] The object and purpose of the provision, the *telos,* must then be explored.[32]

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[27] See also PTC I, Situation in the Democratic Republik of the Congo, Decision on the applications for participation in the proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6 of 17 January 2006, Case No. ICC-01/04, paras. 28 et seq., stating that the Chamber will address the arguments as follows: first the terminological argument, second the contextual argument and third the teleological argument.

[28] See Art. 31 of the Vienna Convention, see also **Satzger**, **H.** (2005). Internationales und Europäisches Strafrecht. Baden-Baden, Nomos. At page 175; **Brownlie**, **I.** (2003). Principles of Public International Law. Oxford, Oxford University Press. At page 604.

[29] Historical interpretation means the inclusion of materials from negotiations, which are typically quite substantial in international law.

[30] See **Delbrück**, **J.** and **R. Wolfrum** (2002). Völkerrecht. Berlin, De Gruyter Recht. At page 640.

[31] See Art. 31(2) of the Vienna Convention; see also **Heikkilä**, **M.** (2004). International criminal tribunals and victims of crimes. Turku, Institute for Human Rights, Abo Akademi University. At page 8; **Delbrück**, **J.** and **R. Wolfrum** (2002). Völkerrecht. Berlin, De Gruyter Recht. At page 642.

[32] See Art. 31(1).

In this context, the principle of "*effet utile*" must be considered. This means that every interpretation of a provision must be made in light of the treaty's intention and must be focused on the promotion of this intention.[33] Finally, regard must be had to the principle of international law that, to the extent that a treaty provision can be ascribed to a norm of customary law, it is to be interpreted according to this corresponding norm of customary law.[34]

Another rule of interpretation, the rule of "strict construction" is to be found in Art. 22(2).[35] Commentators have predicted that "there will be those who argue that the Rome Statute should be subject to the rule of "strict construction", or that, in the event of ambiguity or uncertainty, the result more favourable to the accused should be endorsed.[36] Such an interpretation could become relevant in the context of victim participation. However, in the first instance this paragraph applies only to the definitions of crimes in Arts.6-8. It has also been said that the judges will be entitled in some circumstances to apply more liberal methods of construction in some circumstances.[37]

The Statutes of the Tribunals for the former Yugoslavia and Rwanda are not treaties, but resolutions adopted by the Security Council ("SC") of the United Nations ("UN"). As expressions of customary law, the rules of the Vienna Convention are nevertheless applicable to the Statutes.[38]

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[33] **Ipsen**, **K.** (2004). Völkerrecht. München, C.H. Beck. At page 144; **Delbrück**, **J.** and **R. Wolfrum** (2002). Völkerrecht. Berlin, De Gruyter Recht. At page 644.

[34] See **Kittichaisaree**, **K.** (2001). International Criminal Law. Oxford, Oxford University Press. At page 45.

[35] There it is said that "the definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted".

[36] See **Schabas**, **W. A.** (2004). An Introduction to the International Criminal Court. Cambridge, Cambridge University Press. At page 75.

[37] See **Broomhall**, **B.** (1999). Art.22, *Nullum crimen sine lege*. Commentary on the Rome Statute of the International Criminal Court. Observers' Notes, Article by Article. O. Triffterer. Baden-Baden, Nomos Verlagsgesellschaft**:** 447-462. At page 457.

[38] See **Prosecutor vs. Aleksovski**, Appeals judgement of 24 March 2000, ICTY Case No. IT- 95-14/1, para. 98; **Prosecutor vs. Mucic et. al., "Celebici",** Judgement of 16 November 1998, ICTY Case No. IT-96-29; at para. 1161; **Prosecutor vs. Milošević,** Decision of 8 November 2001, ICTY Case No. IT-02-05, para. 47;

These principles of interpretation now shall provide a basis for the entirety of this study.

CHAPTER 2 - The legal situation for victims in international criminal law prior to the establishment of the ICC

A. Victims´ participation before the International Military Tribunals at Nürnberg and for the Far East

In 1945 international human rights law was still in an embryonic state.[39]

The International Military Tribunals at Nürnberg ("IMTN") and Tokyo ("IMTFE") were the first international courts to prosecute war criminals. Neither court addressed the protection and rights of victims in its Statute or Rules of Procedure ("RP"). The Statutes made no mention of the word "victim", nor did they mention that victims or witnesses might have rights to protection and support. The Military Tribunals operated under rudimentary RP[40] which also made no mention of victims. Few victims were called to testify as witnesses before the IMTN. The cases were based mainly on the voluminous and detailed documentary evidence that the Nazis themselves had compiled.[41] The protection of victims and witnesses or even the participation of victims did therefore not seem as relevant and present a topic as it would become before later international criminal courts.

Prosecutor vs. Kanyabashi, Appeal Dissenting Opinion of 3 June 1999, ICTR Case No. ICTR-96-15-1. para. 21; **Prosecutor vs. Bagasora et al.,** Decision of 5 Dec 2001, ICTR Case No. ICTR-96-7, para 2.

[39] The Universal Declaration of Human Rights was not adopted by the UN General Assembly until 1948. Universal Declaration of Human Rights, G.A. Res. 271 A (III), 10 Dec. 1948, http://www.un.org/Overview/rights.html.

[40] The RP at Nürnberg barely covered three and a half pages, with a total of 11 rules, comprising little more than four pages of text. All procedural problems were resolved by individual decisions of the Tribunal. At Tokyo there were nine rules of procedure contained in its Charter and, again, all other matters were left to the case-by-case ruling of the Tribunal.

[41] See **Neuner**, **M.** (2002). The Power of International Criminal Tribunals to produce Evidence. National Security and International Criminal Justice. H. Roggemann and P. Sarcevic. The Hague, Kluwer Law International**:** 163-191. At page 173, footnote 44.

As victims were neither mentioned nor accorded any rights before the IMTs it is true to say that victims were in general not perceived as such either by the IMTN or by the IMTFE.

B. Victims´ participation before the International Criminal Tribunal for the former Yugoslavia, before the International Criminal Tribunal for Rwanda and before the Special Court for Sierra Leone

I. Introduction

By paragraph 1 of resolution 808 (1993) of 22 February 1993, the Security Council decided "that an International Tribunal shall be established for the prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991."[42] By para. 1 of resolution 955 (1994) of 8 November 1994 the SC decided "to establish an international tribunal for the sole purpose of prosecuting persons responsible for genocide and other serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for genocide and other such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994 and to this end to adopt the Statute of the International Criminal Tribunal for Rwanda annexed hereto."[43]

The Special Court for Sierra Leone ("SCSL") only recently became operational[44]. It was established by an agreement between the UN and the Government of Sierra Leone pursuant to a Security Council resolution.[45]

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[42] Security Council Resolution 808 (1993), S/RES/808, para. 1; http//:www.un.org/icty/basic/statut/S-RES-808_93.htm.

[43] Security Council Resolution 955 (1994), S/Res/955; http://69.94.11.53/ENGLISH/Resolutions/955e.htm.

[44] The Special Court indicted seven persons in March 2003, see UN Doc. Press Release 11 March 2003.

[45] See UN Doc. S/2002/246, para. 58, see also UN Doc. S/RES/1315 (2000); http://documents-dds-ny.un.org/doc/UNDOC/GEN/N00/605/32/pdf/N0060532.pdf?OpenElement.

The creation of these Tribunals was preceded by a considerable hiatus in terms of the creation of other international criminal courts to deal with the atrocities that occurred throughout the world.[46]

The rights of victims were recognised in general terms in numerous treaties and other instruments that were adopted in the time span between the end of World War II and the establishment of the International Criminal Tribunal for the Former Yugoslavia ("ICTY") and the International Criminal Tribunal for Rwanda ("ICTR").[47]

In November 1985, the UN prepared and adopted an important instrument in shape of the *Declaration of Basic Principles for Victims of Crime and Abuse of Power ("Victims Declaration")*[48]. This declaration has been described as a Magna Charta for victims[49] and indeed seems to be a milestone for standards regarding the treatment and protection of victims. The Basic Principles contained in the Declaration are addressed to states generally but they should no less apply to collective legal persons such as international courts.[50] The Victims Declaration lays down four categories of claims that victims may make: access to justice and fair treatment, restitution, compensation and assistance.

At the same time as these international developments, greater attention started to be paid to the role, concerns and rights of victims of crime in domestic criminal justice systems. From the 1960s onwards, a "victims´ movement" emerged and grew which advocated an

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[46] After Nuremberg and the ratification of the Genocide Convention in 1948, an initial effort was put forth to create a permanent international criminal court. The Cold War, however, chilled what little momentum had emerged and, for almost fifty years, the World War II tribunals served as the only models of transnational criminal justice institutions. See **Glickman**, **S.** (2004). "Victim's Justice: Legitimizing the Sentencing Regime of the ICC: Dorsey and Whitney Student Writing Prize in Comparative and International Law Best Note Award Winner." Columbia Journal of Transnational Law **43**: 229-268. At page 232.

[47] As for example the International Covenant of Civil and Political Rights of 1966, granting a right to effective remedy and others.

[48] General Assembly Resolution 40/43 (1985), A/RES/40/43, http://www.un.org/documents/ga/res/40/a40r034.htm.

[49] **Melup**, **I.** (1999). The United Nations Declaration on Principles of Justice for Victims of Crime and Abuse of Power. The Universal Declaration of Human Rights: fifty years and beyond. Y. Danieli, E. Stamatopoulou and C. J. Dias. Amityville, New York, Baywood Publishing Company. Pp 53 et seq.

[50] **Clark**, **R. S.** and **D. Tolbert** Ibid.Toward an International Criminal Court**:** 99-112. At page 102.

enhancement of the role and rights of crime victims within the criminal justice process[51] and led to the creation of participatory rights of varying degrees in many countries.[52]

In international criminal law, the question of how persons who have come to be designated as "victims and witnesses" should be treated (though, in many cases, witnesses have themselves been victims) was a topic of debate from the time that the Tribunals for the Former Yugoslavia and Rwanda were established.[53] The continuing armed conflict and the conclusions of the Commission of Experts appointed by the UN Security Council to investigate the allegations of atrocities in the former Yugoslavia[54] had caused the Secretary-General to recommend that protective measures for witnesses and victims be incorporated within the proposed Tribunals' Rules of Procedure and Evidence.[55] At the same time he reaffirmed the rights of accused persons to a fair trial.[56]

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[51] See Aldana-Pindell, R. (2004). "An Emerging Universality of the Justiciable Victims' Rights to the Criminal Process to Curtail Impunity for State-Sponsored Crimes." Human Rights Quarterly 26: 605-686. At page 621; see also Sanders, A. (2002). Victim Participation in an Exclusionary Criminal Justice System. New Visions of Crime Victims. C. Hoyle and R. Young. Oxford and Portland, Oregon, Hart Publishing. At page 202; see also Tobolowsky, P. M. (2001). Crime victim rights and remedies. Durham, Carolina Academic Press. At page 7.

[52] See **Stahn**, **C.**, **H. Olasolo**, et al. (2006). "Participation of Victims in Pre-Trial Proceedings of the ICC." Journal of International Criminal Justice **4**(1): 219-238. At page 220; see also **Doak**, **J.** (2003). "The victim and the Criminal Process: An Analysis of recent trends in Regional and International Tribunals." Legal Studies **23**(1): 1-33. At pages 4 and 5.

[53] **Clark**, **R. S.** and **M. Sann** (1996). "Coping with Ultimate Evil Through the Criminal Law." Criminal Law Forum **7**(1): 1-13. Pp 1 et seq.

[54] Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992), http://ods-dds-ny.un.org/doc/UNDOC/GEN/N92/484/40/IMG/N9248440.pdf?OpenElement, U.N. Doc. S/1994/674 (27 May 1994); www.his.com/~twarrick/commxyu2.htm.

[55] Report of the Secretary-General Pursuant to Paragraph 2 of the Security Council Resolution 808 (1993), http://ods-dds-ny.un.org/doc/UNDOC/GEN/N93/098/21/IMG/N9309821.pdf?OpenElement, U.N. Doc. S/25704, paras 99 and 108 (3 May 1993); http://www.un.org/icty/basic/statut/S25704.htm. The Secretary General´s Report states in paragraph 99 that *"the Trial Chamber should also provide appropriate protection for victims and witnesses during the proceedings"*, and further in paragraph 108:*"In the light of the particular nature of the crimes committed in the former Yugoslavia, it will be necessary for the International Tribunal to ensure the protection of victims and witnesses. Necessary protection measures should therefore be provided in the rules of procedure and evidence for victims and witnesses, especially in cases of rape and assault. Such measures should include, but should not be limited to the conduct of in camera proceedings and the protection of the victim´s identity."*.

[56] Report of the Secretary-General Pursuant to Paragraph 2 of the Security Council Resolution 808 (1993), U.N. Doc. S/25704, paras 99 and 106 (3 May 1993); http://www.un.org/icty/basic/statut/S25704.htm.

In May 1993, the Security Council ("SC"), with resolution 827 (1993) and acting under Chapter VII of the Charter of the UN, adopted the Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law committed in the Territory of the Former Yugoslavia since 1991 ("ICTY Statute") contained in the report of the Secretary-General[57], while the Statute of the ICTR had already been adopted in the Resolution establishing the Court.[58]

In contrast to the Military Tribunals´ Statutes, the International Covenant on Civil and Political Rights ("ICCPR")[59] and the European Convention on Human Rights ("ECHR")[60] which do not list the protection of victims and witnesses as one of their primary considerations, there are references to victims throughout the ICTs' Statutes and the Rules of Procedure and Evidence[61] ("RPE"). It seems that the Tribunals were created with the Victims Declaration at least partly in mind.

II. The notion of "victim"

A determination of victims' rights first requires clarification of the term "victim", to be able to specify which persons will be accorded victims' rights.

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[57] Report of the Secretary-General Pursuant to Paragraph 2 of the Security Council Resolution 808 (1993), U.N. Doc. S/25704, annex (3 May 1993); http://www.un.org/icty/basic/statut/S25704.htm.

[58] Security Council Resolution 955 (1994), S/Res/955; http://69.94.11.53/ENGLISH/Resolutions/955e.htm, para.1: "…and to this end to adopt the Statute of the International Criminal Tribunal for Rwanda annexed hereto."

[59] See Art. 14 ICCPR which concerns the right to a fair trial.

[60] See Art. 6 ECHR which concerns the right to a fair trial.

[61] The ICTY Rules have been adopted pursuant to Art. 15 of the Statute which states that the Tribunal as a whole should draft and adopt the rules of procedure and evidence of the International Tribunal to regulate inter alia the protection of victims and witnesses. The RPE came into force on 14 March 1994. There have been several amendments over the following years, see http://www.un.org/icty/basic/rpe/IT32_rev32.htm.

Rule 2 A of the RPE ICTY (Rule 2 A RPE ICTR)[62] provides for the following definition: "Victim" is a person against whom a crime over which the Tribunal has jurisdiction has allegedly been committed".

The Victims' Declaration provides for a different definition for victims of crimes[63]:

"Victims of crimes are persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal laws operative in Member States, including those laws proscribing criminal abuse of power".[64] Para. 2 of the Declaration indicates that the term "victim" also includes, where appropriate, the immediate family or dependants of the direct victim and persons who have suffered harm in intervening to assist the victim in distress to prevent victimization.

This definition is much wider than the definition provided for by the ICTs: Rule 2 A RPE does not specify whether the persons shall have suffered harm collectively or individually, neither does it say anything of emotional injuries, economic loss etc., nor if omissions have the same effect as acts. Furthermore the definition of the ICTY only includes direct victims and does not include family members or persons who have suffered harm in intervening to assist the victim.

The definitions cannot be compared directly because they were not created in the same context and do not have the same purpose. The Victims' Declaration deals with State responsibility and calls, in a general manner, on States to implement legislation in favour of victims. [65] The definition in the RPE ICTY, in contrast, has direct consequences for the

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[62] Both the ICTY and the ICTR have similar – although not identical - provisions. I will therefore use the ICTY as an example in the following, mentioning the ICTR only when differences occur.

[63] And similarly in para. 18 for victims of abuse of power.

[64] Victim's Declaration. General Assembly Resolution 40/43 (1985), A/RES/40/43, para. 1; http://www.un.org/documents/ga/res/40/a40r034.htm.

[65] **Timm**, **B.** (2001). The Legal Position of Victims in the Rule of Procedure and Evidence. International and National Prosecution of Crimes under International Law. H. Fischer, C. Kreß and S. R. Lüder. Berlin, Berlin Verlag**:** 289-307. At page 289; see also **Möller**, **C.** (2003). Völkerstrafrecht und Internationaler

designated persons. Furthermore, the Victims' Declaration's definition applies to the whole legal system while the Definition of the ICTY applies only to the precise criminal law context to which it relates.[66] Nevertheless, a comparison is possible on some points, if not a direct analogy.

With regard to the group of persons included, the former European Commission on Human Rights in 1972 defined the term "victim" as including not only the direct victim, but also any person who would indirectly suffer prejudice as a result of such violation or who would have a valid personal interest in securing the cessation of such violation.[67] This definition is therefore also broader than that of the RPE ICTY.

If the definition of the RPE does not mention the aspects mentioned in other definitions, this can only mean that these aspects where not meant to be included as these other concepts and aspects where already in existence when the RPE were drafted.

The ICTY and the ICTR have in their jurisprudence so far given no indications as regards the interpretation of Rule 2 A. This is presumably due to the fact that it was not necessary for the Tribunals to clarify the term, as victims can only appear in their role as witnesses. Although there are references throughout the Statutes and the RPE, they do not envisage any role or function for victims apart from being witnesses. Victims are part of a witness protection scheme and are not addressed as victims as such. Indeed, victims who do not intend to testify will not benefit from protection. On the other hand, witnesses who are not direct victims of crimes under the Jurisdiction of the Tribunal can access such protection,[68] whereas the majority of the witnesses were actually victim witnesses.[69] This

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Strafgerichtshof - kriminologische, straftheoretische und rechtspolitische Aspekte. Münster, LIT Verlag. At page 550.

[66] **Safferling**, **C. J. M.** (2003). "Das Opfer völkerrechtlicher Verbrechen." Zeitschrift für die gesamte Strafrechtswissenschaft **115**: 352-384. At page 365.

[67] See **X v. Federal Republic of Germany,** App. 4185/95, 35 Eur. Commn. HR., Dec. &Rep. 140, 142 (1972).

[68] **Chifflet**, **P.** (2003). The Role and Status of the Victim. International criminal law: developments in the case law of the ICTY. W. A. Schabas and G. Boas. Leiden, Martinus Nijhoff**:** 75-111. at page 77.

[69] See Ninth Annual Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former

conception has meant that it has not been necessary so far to further define the term "victim".

We may therefore conclude that the definition of victim by the RPE leaves out some important aspects. It has been criticized for not conforming to the UN Victim Declaration definition.[70] The definition can be seen as an achievement in the way that it after all accepts that there is such a "category victim".

However, as the definition alone does not provide victims with their own independent rights, the achievement is unsatisfactory. The definition would be far too short and imprecise for a body of legislation that provided for independent victims' rights.

III. Participation

There are in general different possibilities for victims to participate in criminal proceedings. They can "participate" in their capacity as witnesses, they can put forward reparation claims or they can participate in the penal process in their capacity as victims. As mentioned above,[71] the third of these alternatives will be examined, as testifying as a witness is not a participatory right in the pure sense of the term. With regard to reparation claims, I would like to, again, refer readers to a recent study on reparations.[72]

Art. 6(b) of the Victims' Declaration already considered the participation of victims in their own capacity.[73] However, the Statute and RPE of the ICTY have been elaborated

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Yugoslavia since 1991, A/57/150 of 4 August 2002, http://www.un.org/icty/rappannu-e/2002/index.htm, at para. 268.

[70] See **Donat-Cattin**, **D.** (1999). The Role of Victims in ICC Proceedings. Essays on the Rome Statute of the International Criminal Court, Vol. I. F. Lattanzi and W. A. Schabas. Ripa di Fagnano Alto, Sirente. **1:** 251-277, **Donat-Cattin**, **D.** (1999). Art. 68 "Protection of victims and witnesses and their participation in the proceedings". Commentary on the Rome Statute of the International Criminal Court. Observers´Notes Article by Article. O. Triffterer. Baden-Baden, Nomos Verlagsgesellschaft. At page 884.

[71] See above, page 7.

[72] See **Dwertmann, Eva,** The Reparations System of the International Criminal Court, its implementation, possibilities and limitations, forthcoming.

[73] Art. 6(b) of the Victims Declaration states: The responsiveness of judicial and administrative processes to the needs of victims should be facilitated by:…(b) Allowing the views and concerns of victims to be

entirely on the basis of the Anglo-Saxon adversarial model of criminal law[74] whereby the victim's role is merely to appear as a witness of one of the parties to the proceedings.[75] The ICTY, like the ICTR and the Special Court for Sierra Leone have therefore not arranged for victims to participate in their personal capacity in the proceedings.

The definition of "party" in Rule 2 A RPE ICTY does not include the victim as a party. The victim does not have the right to be involved with the court and its proceedings as victim *qua* victim. He or she can only testify as a witness if one of the parties makes an explicit request to that effect and then only within the ambit of examination and cross-examination. He or she cannot instigate a criminal investigation or prosecution. He or she cannot have a lawyer present to assist in the course of the testimony, nor can he or she be present when other witnesses are testifying. There is no right to access evidence and no right to information concerning the proceedings. Further restrictions on victim "participation" include the requirement that the victim take the oath and the possibility of being brought into contempt[76] should he or she fail to tell the truth during the proceedings. It is also not possible for a victim to demand to be kept informed of the progress of the proceedings, even where it is of personal concern to him or her. Finally, the victim does not have the right to pursue a criminal claim and to seek to bring the perpetrator(s) to justice. Such a right, which may even be a duty, falls within the domain of the competent prosecuting authorities, leaving the right to represent the rights of the victims to the prosecutor. [77] The most that the victim can do is to inform the prosecuting

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presented and considered at appropriate stages of the proceedings where their personal interests are affected, without prejudice to the accused and consistent with the relevant national criminal justice system.

[74] **Walleyn**, **L.** (2002). "Victimes et temoins de crimes internationaux: du droit a une protection au droit a la parole." Revue Internationale de la Croix-Rouge **84**(845): 51-92. At page 54 **Ambos**, **K.** (1998). "Strafverteidigung vor dem UN-Jugoslawiengerichtshof." Neue Juristische Wochenzeitung(20): 1444-1447. At page 1446.

[75] **Doak**, **J.** (2005). "Victims' Rights in Criminal Trials: Prospects for Participation." Journal of Law and Society **32**(2): 294-316. At page 294; see also **Swiss Association against Impunity**. The victim's role before the International Criminal Tribunal for the Former Yugoslavia and Rwanda (2004).

[76] See Rule 77, Rule 91 RPE.

[77] **van Boven**, **T.** (1999). The Perspective of the Victim. The Universal Declaration of Human Rights: fifty years and beyond. Y. Danieli, E. Stamatopoulou and C. J. Dias. Amityvill, New York, Baywood Publishing Company. At page 21.

authority of the crimes. Victims are thus treated a mere instrument in criminal proceedings, they serve the interests of justice rather than justice serving their interests as victims, if not those interests coincidentally concur. The Courts have been widely criticized for this fact.[78]

Although it is not possible for victims to participate in the proceedings before the ICTs, the way they are treated when participating as witnesses before the ICTY may also reveal some problems that might arise in victim participation before the ICC.

For example, there was heavy criticism surrounding the *Krstić* case where judges gave victim-witnesses an opportunity to speak freely at the end of their testimony[79], establishing in effect an informal and *ad hoc* victim participation regime. It was said that in that case through frequently interrupting victim-witnesses when their narratives became irrelevant to the purposes of assessing the guilt of the accused and through centring the interests of a speedy trial rather than those of the victim, victim-witnesses where silenced rather than heard which could be damaging for some victim-witnesses.[80]

In 1999 a UN Expert Group was established with the task of recommending improvements to the procedure of the ICTY and the ICTR. Its recommendations included reducing both the number of witnesses and the length of their testimony.[81] Reforms followed with the result for instance that in December 2000 Rule 90(A) which had favoured oral testimony, was deleted. This shows that there has been a tendency to cut down rather than encourage participative elements for reasons of efficiency.

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[78] See e.g. **Kamatali, J.** "From the ICTR to ICC: Learning from the ICTR Experience in Bringing Justice to Rwandans." New England Journal of International and Comparative Law **12** (1): 88-102. At page 98.

[79] See e.g. **Prosecutor vs. Kristić**, Transcript of 22 March 2000, Case No. IT -98-33, at 1067.

[80] **Dembour**, **M.-B.** and **E. Haslam** (2004). "Silence Hearings? Victim-Witnesses at War Crimes Trials." European Journal of International Law **15**(1): 151-177. At page 151. See also **Stover**, **E.** (2005). The Witnesses War Crimes and the Promise of Justice in The Hague. Philadelphia, University of Pennsylvania Press. Naming various examples of re-traumatizing moments by the process of testifying.

[81] See UN Doc. A/54/634 (1999); http://documents-dds-ny.un.org/doc/UNDOC/GEN/N00/230/32/img/N0023032.pdf?OpenElement.

It is interesting that the ICTY has admitted victim impact statements in a few cases.[82] Victim impact statements are statements read into the record during sentencing to inform the judge or jury of the financial, physical, and psychological impact of the crime on the victim and the victim's family.[83]

Initially victim impact statements were not provided for by Statute or Rules but today Rule 92 *bis* provides that "a Trial Chamber may admit the evidence of a witness in the form of a written statement *in lieu* of oral testimony which goes to proof of a matter other than the acts and conduct of the accused as charged in the indictment".

At this point one can already see that this type of "participation" in the proceedings is not equivalent to victim participation in its real sense. On the one hand Rule 92 *bis* applies only to the victim in his or her capacity as a witness. On the other hand the statements cannot be made orally. With regard to their content, the statements are limited to a certain subject area and also apply only to a certain phase of the proceedings, they are relevant only at sentencing. It is further up to the parties, to decide whether or not to present victim impact statements. The victims themselves have no right to submit such statements.

Even if there might be some positive effects of such statements for victims, victim impact statements still do not give real participatory rights.

Another possibility could be to let a victim participate in the proceedings as an *amicus curiae*. An *amicus curiae* is a person who is not party to a lawsuit but who petitions the court or is requested by the court to file a brief in the action because that person has a strong interest in the subject matter.[84] Rule 74 states in this regard: "A Chamber may, if it considers it desirable for the proper determination of the case, invite or grant leave to a

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[82] See e.g. **Prosecutor vs. Delalić ("Čelebići")**, Judgement, Case No. IT-96-21, 16 November 1998, para. 1263; **Prosecutor vs. Tadić**, Sentencing Judgement, Trial Chamber II, Case No. IT-92-1, 14 July 1994, para. 4.

[83] **Garner**, **B. A.** (1999). Black' s Law Dictionary. St. Paul, Minnesota, West Group. At page 1561.

[84] Ibid. At page 83.

State, organization or person to appear before it and make submissions on any issue specified by the Chamber".

In this context, it is important to note at the outset that for victims before the ICTY this option has yet to become anything more than a theoretical possibility – there has not been any case where a victim has participated as *amicus curiae*. Such participation has been granted in one case to scholars of the international rights of women and to representatives of non-governmental organizations.[85] Some argue that Rules allowing the Court to invite or to grant leave to an organisation or an individual to appear before it, are sufficiently broad to ensure that the interests of victims will be adequately represented throughout the proceedings.[86] In response, it has been said that it is one thing to be recognised as party or participant to the proceedings – as proposed for the first time in the Preparatory Committee for the ICC of August 1997 – but it is another to be invited by the judges to appear once before them as "a friend of the Court".[87]

It is also doubted here that such a "participation" is an adequate representation of victims needs. As one can see from Rule 74 the possibilities for participation as *amicus curiae* are limited. Submissions made will mostly be in written form. It is then normally up to the Trial Chamber to determine whether such participation is helpful for the proper determination of the case. If the Trial Chamber does not invite victims to appear as *amici* they will probably not even be aware of this possibility because there is no notification procedure for them. Furthermore there will be no assistance by legal counsel for this kind of participation, whereby an integral part of effective participation is missing.

Indeed, in the *Milošević* case, in which the accused refused to be represented by a lawyer, an *amicus* was appointed in the interest of a fair trial, not to represent but to assist in the

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[85] See **Prosecutor v. Furundzija**, Judgement, ICTY Case No. IT-95-17/1-T, 10 December 1998, para. 35.

[86] **Morris**, **V.** and **M. P. Scharf** (1998). The International Criminal Tribunal for Rwanda. Irvington on Hudson, Transnational Publishers. At Page 577.

[87] **Donat-Cattin**, **D.** (2001). The Rights of Victims and International Criminal Justice. International Lawyers as we enter the 21st Century, International Focus Programme 1997-99. E. International. Berlin, Berlin Verlag. At page 191.

proper determination of the case.[88] The *amici* appointed in this case were granted far-reaching rights and acted almost as a defence lawyer. For example they were accorded the right to take part of confidential documents[89] and to cross-examine witnesses[90]. However, as mentioned above such rights have not been accorded to victims up to this point and it can be doubted whether they will be in the future. The bottom line of these experiences is that participation as an *amicus curiae* will not compensate for real victim participation.

At the ICTR the situation concerning victim participation is slightly different. Indeed, the Statute and Rules do not provide for a possibility for victims to participate in their capacity as victims there either. However, at the ICTR there were some victim-related *amicus curiae* situations. In the *Jean-Paul Akayesu* case[91] the NGO "Coalition for Women's human rights in conflict situations" applied to file an *amicus curiae* brief in 1997 with the goal of calling upon the prosecutor to review the evidence and to amend the indictment in order to charge rape and other sexual violence and to suggest that massive rapes can be charged as genocide.[92] Another *amicus curiae* brief was filed by the Rwandan Government the 20th of April 1998 in the *Bagosora* case[93] with the goal of considering the restitution and compensation issues for victims.[94] The ICTR therefore did not provide for the possibility for victims to participate in their own capacity as *amicus curiae* either.

Apart from this victims were given limited rights to participate in town hall settings where they were asked to be judge and jury against low level perpetrators.

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[88] See **Prosecutor vs. Milošević**, Order inviting designation of amicus curia, ICTY Case No. IT-02-54, 30 August 2001.

[89] See **Prosecutor vs. Milošević**, Order concerning the provision of documents to *amici curiae*, ICTY Case No. IT-02-54, 19 September 2001.

[90] See for example **Prosecutor vs. Milošević**, Transcript of 24 May 2002.

[91] See Case No. ICTR-96-4.

[92] See Women's Human Rights In Conflict Situations Newsletter, Vol. 1 Number 1, July 1997.

[93] See Prosecutor vs. Jean-Paul Akayesu, Case No. TPIR-96-7-I.

[94] See Fondation Hirondelle at http://www.hirondelle.org/hirondelle.nsf/0/48946dbe58a37270c125680100703134?OpenDocument.

Even if at the ICTR victims were included to a greater degree through different levels of quasi-participation, they were still not given the opportunity to participate in the true sense. The ICTR Plenary had considered specific Rule changes made by the Prosecutor considering victim participation but did not adopt the proposals.[95] In the end the situation was not really much different than the one at the ICTY.

Finally, it should be emphasized that the Tribunals have managed to develop a number of mechanisms to protect victims and witnesses and have also established a Victims and Witnesses Section ("VWS").[96] This is interesting because a functional protection scheme is a precondition for effective victim participation. The experience gained before the ICTs will serve the ICC even if it has been the subject of much criticism especially with regard to protection outside the court.[97]

IV. Conclusion

As stated above, one reason for not giving victims a right to participation in both Tribunals was that the Statute and RPE were based on the adversarial system which sees

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[95] See Judges Report of 13 September 2000; http://www.un.org/icty/pressreal/tolb-e.htm.

[96] See for example **Aldana-Pindell**, **R.** (2004). "An Emerging Universality of the Justiciable Victims' Rights to the Criminal Process to Curtail Impunity for State-Sponsored Crimes." Human Rights Quarterly **26**: 605-686. At page 658; **van Boven**, **T.** (1999). The Position of the Victims in the Statute of the International Criminal Court. Reflections on the International Criminal Court, Essays in Honour of Adrian Boos. H. von Hebel, J. G. Lammers and J. Schukking. The Hague, TMS Asser Press**:** 77-89. At page 80; **Mumba**, **F.** (2001). Ensuring a Fair Trial whilst Protecting Victims and Witnesses- Balances of Interests ? Essays on ICTY Procedure and Evidence in Honour of Gabrielle Kirk McDonald. R. May, D. Tolbert, J. Hockinget al. The Hague, Kluwer Law International.; **McDonald**, **A.** (2002). The Role of Victims and Witnesses in International Criminal Trials. Treaty Enforcement and International Cooperation in Criminal Matters with special reference to the Chemical Weapons Convention. R. Yepes-Enriques and L. Tabassi. The Hague, T.M.C. Asser Press**:** 257-276. At page 262.

[97] See for example **Donat-Cattin**, **D.** (1999). Art. 68 "Protection of victims and witnesses and their participation in the proceedings". Commentary on the Rome Statute of the International Criminal Court. Observers´Notes Article by Article. O. Triffterer. Baden-Baden, Nomos Verlagsgesellschaft. At page 870 pointing out that before the Rwandan Tribunal persons after having testified as witnesses went home and were killed; see also **Heikkilä**, **M.** (2004). International criminal tribunals and victims of crimes. Turku, Institute for Human Rights, Abo Akademi University. At page 139; Procedural and evidentiary issues for the Yugoslav war crimes Tribunal, Helsinki Watch, Augst 1993 in: **Morris**, **V.** and **M. P. Scharf** (1995). An Insider´s Guide to the International Criminal Tribunal for the Former Yugoslavia. A Documentary History and Analysis. Irvington-on-Hudson, New York, Transnational Publishers.; **Bassiouni**, **M. C.** and **P. Manikas** (1996). The Law of the International Criminal Tribunal for the Former Yugoslavia. Irvington on Hudson, New York, Transnational Publishers. At page 604.

the victim's primary role as that of appearing as a witness for one of the parties to the proceedings.[98]

A further explanation of the situation before both tribunals is that the primary concern of the drafters of the Statutes and RPE was the punishment of those guilty of serious violations of international humanitarian law. The objects and purpose of the ICTY, and hence the Tribunal's Statute have been identified as threefold: (1) to do justice; (2) to deter further crimes; and (3) to contribute to the restoration and maintenance of peace.[99] Some have further identified rendering justice to victims as a fourth objective.[100]

One can thus make a distinction between three respectively four objectives. However, it should be enhanced that the wording of Resolution 827 (1993)[101] that established the ICTY and the wording of Resolution 955 (1994)[102] that established the ICTR[103] show that, in essence, the tribunals have only one official function, namely to prosecute and punish.[104] This concern has resulted in the prosecution being given broad powers including the task of representing the victims at all stages of the proceedings, while withholding those rights from the victims themselves.

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[98] See above at page 19.

[99] See **Prosecutor vs. Tadić**, Case No. IT-94-1, Decision on the Prosecutor's motion requestion protective measures for victims and witnesses, 10 August 1995, para. 18.

[100] See **Heikkilä**, **M.** (2004). International criminal tribunals and victims of crimes. Turku, Institute for Human Rights, Abo Akademi University. At page 9 refering to the webpage of the Tribunal: www.un.org/icty "the ICTY at a Glance→General Information; see also **McDonald**, **A.** (2002). The Role of Victims and Witnesses in International Criminal Trials. Treaty Enforcement and International Cooperation in Criminal Matters with special reference to the Chemical Weapons Convention. R. Yepes-Enriques and L. Tabassi. The Hague, T.M.C. Asser Press**:** 257-276. At page 64.

[101] Resolution 827 (1993), adopted 25 May 1993, (S/RES/827(1993)); http://www.un.org/icty/basic/statut/S-RES-827_93.htm.

[102] Resolution 955 (1994), adopted 8 November 1994, (S/RES/955 (1994)); http://documents-dds-ny.un.org/doc/UNDOC/GEN/N95/140/97/pdf/N9514097.pdf?OpenElement.

[103] Stating that the Tribunal was set up "for the sole purpose of prosecuting persons responsible for serious violations of international humanitarian law".

[104] Similarly **McDonald**, **A.** (2002). The Role of Victims and Witnesses in International Criminal Trials. Treaty Enforcement and International Cooperation in Criminal Matters with special reference to the Chemical Weapons Convention. R. Yepes-Enriques and L. Tabassi. The Hague, T.M.C. Asser Press**:** 257-276. At page 65.

At the ICTs there has been little attention given to a restorative or reconciliatory role which is often ascribed to international criminal justice[105] or the purpose of "giving a voice to the victims".[106]

It has not been taken into account that the victims' attendance in person at the trial may help in establishing the truth[107] and that, by participating in the proceedings and by obtaining compensation, a victim may be able to regain his or her dignity, thereby contributing, ultimately to the restoration of peace and security.[108]

Furthermore, such a conception of international criminal justice is open to criticism since it ignores the fact that the concerns of the Prosecutor do not necessarily coincide with those of the victims. The Prosecutor is not merely a representative of public justice. He or she is an official administering a bureaucracy that serves a variety of objectives, be they investigative, adjudicative, administrative or political. However high-minded he or she may be in exercising the function, her or his roles as advocate and administrator make it difficult for him or her to be genuinely neutral and to weigh impartially the facts, law and equities which have a bearing on the many decisions he or she must take.[109] Given that the Prosecutor's actions will most probably be governed by the desire to obtain a successful conviction, it is possible that the victims' interests and the interests of the Prosecutor will not coincide.

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[105] See Ibid. At page 259.

[106] In 2004, the ICTY published a list of five successes which it claimed it had accomplished among others "giving a voice to victims", for more information see:http://www.un.org/icty/glance-e/index.htm.

[107] **Jorda**, **C.** and **J. de Hemptienne** (2002). The Status and Role of the Victim. The Rome Statute of the International Criminal Court, A Commentary. A. Cassese, P. Gaeta and J. R. W. D. Jones. Oxford, Oxford University Press. **2:** 1387-1419. At page 1388; Human Rights Watch Commentary to the third Preparatory Commission Meeting on the International Criminal Court, Human Rights Watch (1999). Pp 22 et seq.

[108] **Jorda**, **C.** and **J. de Hemptienne** (2002). The Status and Role of the Victim. The Rome Statute of the International Criminal Court, A Commentary. A. Cassese, P. Gaeta and J. R. W. D. Jones. Oxford, Oxford University Press. **2:** 1387-1419. Pp 1389 et seq.

[109] **Goldstein**, **A.** (1982). "Defining the Role of the Victim in Criminal Prosecution." Mississippi Law Journal **52**: 515-560. At page 555.

For example, certain criminal acts are not prosecuted not because they have not created victims, but because they are not serious enough to disturb international peace and security. This can occur, for instance, when crimes were committed by persons not holding a sufficiently high rank within the political or military hierarchy. As a result of the plea agreement practice at the Tribunal[110], whereby a deal is made between the prosecution and an accused providing that certain counts will be withdrawn in exchange for a guilty plea on other counts, the victims' interests are not taken into account; the victim does not have any chance to influence this process.

Moreover, the fact that the cases often involve a great number of victims and the Tribunals have limited resources may also have played another decisive role in not providing for victim participation. Arguments based on the limited nature of resources can, however, be a question of what weight is accorded to different factors.

Another factor may have been the fact that there were no other international criminal Tribunals that had ever considered victims rights, thus there was no experience to draw upon.[111]

Altogether from the point of view of victims, the work of the ICTs can be considered a disappointment in many ways. For many victims, the Tribunals remained alien and alienating.[112]

However, even the presence of limited references to victims throughout the ICT's Statutes can be seen as helpful[113] in the way that this can be seen as a first step of a rising

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[110] See for example, **Prosecutor vs. Sikirica et. al**. Joint Submission of the Prosecution and the Accused Dragam Kolundzija of a Plea Agreement, Case No. IT-95-8-T. 31 August 2001; **Prosecutor vs. Sikirica et. al**., Admitted Facts Relevant to the Plea Agreement for Dragan Kolundzija, Case No. IT-95-8-T, 4 September 2001; **Prosecutor vs. Sikirica et. al**., Joint submission of the Prosecution and the Accused Dusko Sikirica concerning a Plea Agreement and Admitted Facts, Case No. IT-95-8-T, 7 September 2001.

[111] **Chinkin**, **C.** (2002). The Protection of Victims and Witnesses. Substantive and Procedural Aspects of International Criminal Law. G. Kirk McDonald and O. Swaak-Goldmann. The Hague, Kluwer Law International. **1:** 451-478. At page 452.

[112] Similar **McDonald**, **A.** (2002). The Role of Victims and Witnesses in International Criminal Trials. Treaty Enforcement and International Cooperation in Criminal Matters with special reference to the Chemical Weapons Convention. R. Yepes-Enriques and L. Tabassi. The Hague, T.M.C. Asser Press**:** 257-276. At page 260.

awareness of victims' rights. The ICTs had a role to play in the process that led to the introduction of victim participatory rights before the ICC and maybe also a changing awareness as regards the aims and objectives of international trials.

The absence of any provisions referring to victim participation before the Special Court for Sierra Leone must be seen as a major step backwards from the relatively progressive provisions of the ICC Statute.[114]

C. Victims' participation before the Extraordinary Chambers of the Court of Cambodia

The situation before the Extraordinary Chambers of the Court of Cambodia (ECCC) is different to the above mentioned tribunals insofar as the body of laws governing the forum came into effect much later: the Internal Rules of the ECCC were adopted in June 2007.[115] Besides, the ECCC are not an international Court in the strict sense of that term: The ECCC are based on agreement[116] between the United Nations and the Royal Government of Cambodia that has been implemented through the ECCC Law[117]. The Court is a national tribunal, located at the site of the crimes, but comparable in some

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[113] Or even as significant, see **Bachrach**, **M.** (2000). "The Protection and Rights of Victims." The International Lawyer **34**: 7-21. At page 12.

[114] See equally **McDonald**, **A.** (2002). "Sierra Leone's shoestring Special Court." Revue Internationale de la Croix-Rouge **84**(845): 121-143. At page 141.

[115] See http://www.eccc.gov.kh/english/victims_unit.aspx; as to the history of the Court see **Skilbeck, Rupert**. "Defending the Khmer Rouge." International Criminal Law Review **8** (2008): pp. 423-445.

[116] See Agreement between the United Nations and the Royal Government of Cambodia concerning the prosecution under Cambodian Law of Crimes during the period of Democratic Kampuchea of 6 June 2003, http://www.eccc.gov.kh/english/cabinet/agreement/5/Agreement_between_UN_and_RGC.pdf.

[117] See Law on the establishment of the Extraordinary Chambers in the Court of Cambodia for the prosecution of crimes committed during the period of Democratic Kampuchea of 6 June 2003, NS/RKM/1004/006; http://www.eccc.gov.kh/english/cabinet/law/4/KR_Law_as_amended_27_Oct_2004_Eng.pdf.

respects to an international criminal court. It may therefore be characterized as a "mixed court/tribunal".[118]

A short review of the rights of victims before the ECCC is interesting insofar as the ECCC clearly does provide for participation rights for victims. The ECCC will, in contrast to national courts, also face the same problems as an international criminal court. For instance, a large number of victims will want to participate before the ECCC. Therefore the body of law emanating from the ECCC as well as the practice before the ECCC will also be instructive for the ICC.

The rights of victims before the ECCC are set out in the Code of Criminal Procedure of Cambodia (CPC) and the Internal Rules of the Court. Victims are awarded the right to participate in the proceedings as civil parties. Victims therefore are equal in status of the Prosecution and the Defence. Accordingly, victims have the right to be represented by a lawyer, to be present in the proceedings and to have access to the files. They may furthermore apply for evidence to be taken, ask questions and may make their claim for reparations at the same time as the criminal trial takes place. Ultimately they may also appeal the verdict.[119]

In a landmark decision of March 20th, 2008, the Pre Trial Chamber ruled on the conditions of victims' participation and has awarded victim full participation rights during the hearings on appeals concerning provisional detention before the Pre Trial Chamber.[120]

Moving on from the general right to participate in the proceedings of Rule 23(3) of the Internal Rules, the Pre-Trial Chamber has stated that there is no need to show any special

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[118] See **Cassese, Antonio**.International Criminal Law. Oxford, Oxford Unitversity Press, 2nd edition, 2008. At page 333.

[119] See **Studzinsky, Silke**. "Nebenklage vor den Extraordinary Chambers of the Courts of Cambodia (ECCC) - Herausforderung und Chance oder mission impossible?" Zeitschrift für internationale Strafrechtsdogmatik **1** (2009): pp. 44-50. At page 45. See also **Boyle**, **David**. "The Rights of Victims." Journal of International Criminal Justice **4**(1) (2006): pp. 307-313. At pp. 308 et seq.; see also **Skilbeck, Rupert**. "Defending the Khmer Rouge." International Criminal Law Review **8** (2008): pp. 423-445. At page 432.

[120] See Pre Trial Chamber, in the case of **Nuon Chea**, Decision on civil party participation in provisional detention appeals of 20 March 2008, Criminal Case File No. 002/19-09-2007-ECCC/OCIJ (PTC01).

interest in any stage of the proceedings.[121] On the other hand it has tried to constrain the right of victims to make personal statements.[122]

Overall victims have much more comprehensive rights before the ECCC than before the ICC.

It is therefore rewarding to have a short look at the practice of the ECCC. The ECCC has to cope with a massive shortfall of financial and personal resources for victim participation[123], which is why the ECCC will be confronted with manifold restrictions. Of 2800 applications the ECCC has so far only accepted 28 victims as civil parties.[124]

The procedures before the ECCC have so far not reached an advanced stage so that practicality and implementation of victims‘ rights cannot yet be fully evaluated.

However, it is certain that the practice before the ECCC may not be ignored and may show the extent to which it is possible to have comprehensive rights for victim participation before an international criminal court.

The first Trial, which is expected to take place some time in 2009, will therefore to be watched closely.

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[121] Ibid. At para. 49.

[122] See thereupon more comprehensively **Studzinsky, Silke**. "Nebenklage vor den Extraordinary Chambers of the Courts of Cambodia (ECCC) - Herausforderung und Chance oder mission impossible?" Zeitschrift für internationale Strafrechtsdogmatik **1** (2009): pp. 44-50. At page 46, 47.

[123] See **Skilbeck, Rupert**. "Defending the Khmer Rouge." International Criminal Law Review **8** (2008): pp. 423-445. At page 432.

[124] See **Studzinsky, Silke**. "Nebenklage vor den Extraordinary Chambers of the Courts of Cambodia (ECCC) - Herausforderung und Chance oder mission impossible?" Zeitschrift für internationale Strafrechtsdogmatik **1** (2009): pp. 44-50. At pages 45, 46.

CHAPTER 3 - Victim participation under the Rome Statute

A. Introduction

The International Criminal Court ("ICC") established the first ever permanent international criminal court and aims to promote the rule of law and to ensure that the most serious crimes under international law do not go unpunished. The Rome Statute of the International Criminal Court was created on 17 July 1998, when it was adopted by 120 States participating in the "United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court". The Statute entered into force on 1 July 2002.[125]

Its adoption had been preceded by meetings of the Preparatory Commission that took place over the period from 1996 to 1998 with the aim of drafting the text of the Rome Statute.[126]

Apart from victim protection the Rome Statute provides in Art. 68(3) for the possibility of victims participating in all phases of the proceedings. Unlike its predecessors the Rome Statute affords victims of crimes explicit rights to make representations[127], submit observations[128] and have their views and concerns presented and considered[129]. The precise scope and extent of these provisions will be examined in the following.

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[125] See page „About the Court" at the official website of the ICC, http://www.icc-cpi.int/Menus/ICC/About+the+Court/.

[126] See page "Chronology of the International Criminal Court" at the official website of the ICC, http://www.icc-cpi.int/Menus/ICC/About+the+Court/.

[127] Art. 15(3).

[128] Art. 19(3).

[129] Art. 68(3).

B. Aim and Purpose of victim participation

In order to elucidate the aims and purpose of victim participation before the ICC, the purposes of punishment must first be explored. It can be assumed that the purposes of punishment and those of participation partially overlap or complement one another, or at least that they are not conflicting. The purposes of punishment may not determine the answers to all questions of victim participation in detail, however, the purposes of punishment are highly relevant to the structures of the proceedings and therefore also for the determination of the role of the victim.

I. Purposes of punishment before the ICC

The Rome Statute and the RPE contain no particular norms governing the question of the purposes of punishment. However, one can draw conclusions on this matter from the wording of the preamble.[130]

In classical criminal law theory retribution, deterrence, incapacitation and rehabilitation of the convicted person are typically identified as the main purposes of punishment.[131]

While it is possible to have recourse to the purposes of punishment in domestic criminal law[132], at least to a certain extent[133], when determining the purpose of a term of

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[130] The relevant parts of the Preamble read as follows: "…Mindful that during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity, Recognizing that such grave crimes threaten the peace, security and well-being of the world, Affirming that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation, Determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes…".

[131] **King**, **F.** and **A.-M. La Rosa** (1999). Penalties under the ICC Statute. Collection of Essays on the Rome Statute of the International Criminal Court. F. S. Lattanzi, William A. Ripa di Fagnano Alto, Sirente**:** 311-338. Pp 329 et seq.; **Mumba**, **F.** (2003). Topics within the sphere of sentencing in international criminal law. Man's Inhumanity to Man. Essays on International Law in Honour of Antonio Cassese. L. C. Vohra, F. Pocar, Y. Featherstoneet al. The Hague, Kluwer Law International**:** 567-594. At page 568.

[132] **Werle**, **G.** (2005). Principles of International Criminal Law. The Hague, TMC Asser Press. At page 30.

[133] See **Jäger**, **H.** (1995). Makroverbrechen als Gegenstand des Völkerstrafrechts. Strafgerichte gegen Menschheitsverbrechen. Zum Völkerstrafrecht 50 Jahre nach den Nürnberger Prozessen. G. Hankel and G. Stuby. Hamburg, Hamburger Edition**:** 325-354. According to which „the theoretical justifications so far are not applicable at all [to crimes under international law] or may be transferred only in greatly modified form. pp 339 et seq.

imprisonment for crimes against humanity, this must be done so cautiously. This is because the *ratione materiae* jurisdiction of an international criminal court differs fundamentally from that of a national court which punishes all sorts of offences, usually ordinary crimes.[134] In the following sections, the aims of punishment before the ICC will be set out before moving on to the significance of each aim in relation to the others.

1. Retribution

The wording of the preamble of the Statute indicates that the ICC recognizes "retribution" as one of the purposes of punishment.[135]

In the absence of any elaboration on the objectives of punishment in the Statute and RPE, the Trial Chamber of the ICTY has examined international criminal law precedents on the matter. It identified retribution, deterrence, stigmatization, and to some degree, rehabilitation as goals of punishment.[136] In later cases, the tribunal has confirmed these goals and added reconciliation and protection of society.[137] Of these goals, retribution and deterrence have been singled out as the main goals.[138] The rehabilitative function of punishment has, on the other hand, clearly been given a secondary role.[139]

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[134] See **Prosecutor vs. Erdemović ("Pilica Farm"),** Judgement I, Case No. IT-96-22, 29 November 1996, para. 62.; **Möller**, **C.** (2003). Völkerstrafrecht und Internationaler Strafgerichtshof - kriminologische, straftheoretische und rechtspolitische Aspekte. Münster, LIT Verlag. Pp 413 et seq.

[135] In the preamble it is among other things, affirmed that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation.

[136] See **Prosecutor vs. Erdemović ("Pilica Farm"),** Judgement I, Case No. IT-96-22, 29 November 1996, paras. 64 and 66; **Prosecutor vs. Jokić ("Dubrovnik"),** Judgement, Case No. IT-01-42-/1-S, 18 March 2004,paras. 30 et seq; see also **Prosecutor vs. Kunarac et al. ("Foca")**, Judgement, Case No IT-96-23&23/1, 22 February 2001, paras. 838 et seq.

[137]See **Prosecutor vs. Mucic et. al ("Celebici"),** Judgement, Case No. IT-96-21, 16 November 1998, paras. 1203 and 1232; **Prosecutor vs. Jelisic ("Brcko"),** Judgement, Case No. IT-95-10, 14 December 1999, para. 116.

[138] See e.g. **Prosecutor vs. Aleksovski ("Lasva Valley"),** Appeal Judgement, Case No. IT-95-14/1, 24 March 2000, para. 185; **Prosecutor vs. Mucic et. al. ("Celebici"),** Appeal Judgement, Case No. IT-96-21, 20 February 2001, para. 806; **Prosecutor vs. Kupreskic et al. ("Lasva Valley"),** Judgement, Case No. IT-95-16, 14 January 2000, para. 848.

[139] See e.g.**Prosecutor vs. Blaskic ("Lasva Valley"),** Judgement, Case No. IT-95-14, 3 March 2000, para. 765, **Prosecutor vs. Mucic et. al. ("Celebici"),** Appeal Judgement, Case No. IT-96-21, 20 February

Differing views are to be found among international law scholars on the question of whether retribution should or does have any place in the proceedings before the ICC. Some see retribution as the primary purpose of punishment,[140] while some ascribe a similar significance to retribution and deterrence[141] and others state that the idea of retribution undeniably has its place but that the preventive effect of international criminal law (deterrence; norm stabilization) is even more important.[142] According to others retribution has to be criticised as a purpose of punishment especially in an international context.[143]

However, on the basis of the wording of the preamble, it can be assumed that notwithstanding other purposes retribution will be recognised as a purpose of punishment and will probably rank as one of the primary purposes, even if criticism of this concept is justified.

2001, para. 806; **Prosecutor vs. Kunarac et al. ("Foca"),** Judgement, Case No IT-96-23&23/1, 22 February 2001, para. 844.

[140] See e.g. **Glickman**, **S.** (2004). "Victim's Justice: Legitimizing the Sentencing Regime of the ICC: Dorsey and Whitney Student Writing Prize in Comparative and International Law Best Note Award Winner." Columbia Journal of Transnational Law **43**: 229-268. At page 230; **Heikkilä**, **M.** (2004). International criminal tribunals and victims of crimes. Turku, Institute for Human Rights, Abo Akademi University. At page 67.

[141] See e.g. **Olasolo**, **H.** (2005). The Triggering Procedure of the International Criminal Court. Leiden Boston, Martinus Nijhoff Publishers. At page 23.

[142] **Werle**, **G.** (2005). Principles of International Criminal Law. The Hague, TMC Asser Press. At page 30.

[143] **Ambos**, **K.** (2001). "Vom Sinn des Strafens auf innerstaatlicher und supranationaler Ebene." Juristische Schulung **1**: 9-13. saying that an equation of the wrong sustained was unimaginable in the context of mass crimes. **Möller**, **C.** (2003). Völkerstrafrecht und Internationaler Strafgerichtshof - kriminologische, straftheoretische und rechtspolitische Aspekte. Münster, LIT Verlag. At page 455, saying that through retribution the social acceptance of violence would be perpetuated. A lasting reconciliation process of society could not be achieved with such a perpetuation of social patterns of violence. **Gehrken**, **J.** (2000). "Billig und gerecht? Verfahren zwischen Rechtsstaatlichkeit und Effizienz." Forum Recht **3**. page 3 saying that retribution as a subjective motivation should not be adapted by an objective authority as the ICC; **Jäger**, **H.** (1995). Makroverbrechen als Gegenstand des Völkerstrafrechts. Strafgerichte gegen Menschheitsverbrechen. Zum Völkerstrafrecht 50 Jahre nach den Nürnberger Prozessen. G. Hankel and G. Stuby. Hamburg, Hamburger Edition**:** 325-354. At page 339.

2. Deterrence

Deterrence is also recognised as a purpose of punishment in the preamble[144] and has been cited as one of the main goals by the ICTY.[145] Some authors see deterrence among the primary purposes of punishment[146] while others classify deterrence as a secondary purpose in international criminal law pointing out that such purposes as norm stabilization might prove to be much more effective.[147] Again others hold the view that deterrence is a problematic concept.[148] It has also been held that deterrence has certainly failed thus far. As long as law was not enforced it could hardly bring about deterring effects[149], in the contemporary international context, the retributive and hence deterrent

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[144] "Determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes".

[145] See e.g. **Prosecutor vs. Aleksovski ("Lasva Valley"),** Appeal Judgement, Case No. IT-95-14/1, 24 March 2000, para. 185; **Prosecutor vs. Kupreskic et al. ("Lasva Valley"),** Judgement, Case No. IT-95-16, 14 January 2000, para. 848;**Prosecutor vs. Mucic et. al. ("Celebici"),** Appeal Judgement, Case No. IT-96-21, 20 February 2001, para. 806.

[146] **Werle**, **G.** (2005). Principles of International Criminal Law. The Hague, TMC Asser Press. p.30; **Bassiouni**, **M. C.** (2003). The philosophy and policy of international criminal justice. Man's inhumanity to Man. L. C. Vohra. The Hague, London New York, Kluwer Law International**:** 65-126. At page 821; **Roht-Arriaza**, **N.** (1995). Punishment, Redress, and Pardon: Theoretical and Psychological Approaches. Impunity and human rights in international law and practice. N. Roht-Arriaza. New York, Oxford, Oxford University Press**:** 13-23. At page 14.

[147] **Ambos**, **K.** (2001). "Vom Sinn des Strafens auf innerstaatlicher und supranationaler Ebene." Juristische Schulung **1**: 9-13. At page 13. **Triffterer**, **O.** (1985). Völkerstrafrecht im Wandel? Festschrift für Hans-Heinrich Jescheck zum 70. Geburtstag. T. e. Vogler. Berlin, Duncker & Humblot. 2. Halbband. At page 1466.

[148] **Gehrken**, **J.** (2000). "Billig und gerecht? Verfahren zwischen Rechtsstaatlichkeit und Effizienz." Forum Recht **3**. saying that the apprehension of being called to account for a crime was usually not very present in a war-stricken society especially as international criminal law was momentarily not effective enough to have a deterrent effect; **Roht-Arriaza**, **N.** (1995). Punishment, Redress, and Pardon: Theoretical and Psychological Approaches. Impunity and human rights in international law and practice. N. Roht-Arriaza. New York, Oxford, Oxford University Press**:** 13-23. At page 14 saying that members of oragnizations that abuse basic human rights may ignore deterrence factors because they feel protected by their organizational facade, similarly results might occur within monolithical political party structures; **Möller**, **C.** (2003). Völkerstrafrecht und Internationaler Strafgerichtshof - kriminologische, straftheoretische und rechtspolitische Aspekte. Münster, LIT Verlag. At page 506 also emphasizing the limited and selective assertiveness of present international criminal law.

[149] See **Safferling**, **C. J. M.** (2004). "Can Criminal Law be the Answer to Massive Human Rights violations?" German Law Journal **5**(12): 1469-1488.At page 1483.

capacity of the ICC was severely affected by its relative political weakness.[150] It has been added that the preventive function of an expanding criminal law remained ineffective, that it often takes one-sided action against only certain forms of deviance and certain strata of the population, and thereby serves the interests of specific social groups.[151]

Like retribution, it is clear that deterrence will be one of the purposes of punishment before the ICC. Here, too, it has yet to be seen how significant other purposes will be seen and if deterrence will ultimately be viewed as one of the main purposes of punishment.

3. Stigmatization

It seems possible to interpret the wording of the preamble "to prevent such crimes" in such a way that it comprises special deterrence in terms of stigmatization.[152] The wording, however, is not really clear on that point.

The ICTY has identified stigmatization as a goal of punishment.[153]

Indeed, some commentators argue that the concept of stigmatization is to be regarded as completely inappropriate for the prosecution of crimes under international law. The danger of recidivism is low: usually the convicted person has acted in a very specific societal or political situation in which the person will most probably never find him or herself again.[154]

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[150] See **Lu**, **C.** (2006). The International Criminal Court as an Institution of Moral Regeneration: Problems and Prospects. Bringing power to justice? : the prospects of the International Criminal Court. J. Harrington. Montréal, McGill-Queen's University press: 191-209. At page 367.

[151] See **Stolle**, **P.** and **T. Singelnstein** (2007). On the Aims and Actual Consequences of International Prosecution of Human Rights. International Prosecution of Human Right Crimes. W. Kaleck, M. Ratner, T. Singelnstein and P. Weiss. Heidelberg, Springer**:** 37-52. At page 37.

[152] See similarly **Nemitz**, **J. C.** (2002). Strafzumessung im Völkerstrafrecht. Freiburg i. Br., edition iuscrim. At page 17.

[153] See **Prosecutor vs. Erdemovic ("Pilica Farm"),** Judgement I, Case No. IT-96-22, 29 November 1996, paras. 64 and 66.

[154] **Möller**, **C.** (2003). Völkerstrafrecht und Internationaler Strafgerichtshof - kriminologische, straftheoretische und rechtspolitische Aspekte. Münster, LIT Verlag. At page 447.

Overall it seems evident, that stigmatization will not constitute one of the primary purposes of punishment before the ICC.

4. Incapacitation/neutralization

Incapacitation is not mentioned explicitly in the context of the ICC as an aim of punishment. In later cases, the ICTY has added the "protection of society" as a goal of punishment, saying that this is an important factor and often involves long sentences of imprisonment.[155] The focus may not be on this purpose[156] but the ICC, too, will surely enunciate long sentences of imprisonment where it believes the perpetrator is a danger to society. The significance of incapacitation as a negative specific prevention in an international context if at all, may be seen as laying not so much in imprisoning the perpetrator, as in depriving him of the special social position that permitted the criminal behaviour in the first place.

5. Rehabilitation

The purpose of rehabilitating the convicted person into society could also be inferred from the preamble's wording "to prevent such crimes" if one accepts that rehabilitation has a preventive effect. The ICTY accepted this as a purpose of punishment while clearly giving it a secondary role. [157]

Given the fact that the ICC will usually give long, often lifelong sentences, the present purpose of punishment may ultimately be of less significance than other matters.[158] It has

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[155] See **Prosecutor vs. Mucic et. al ("Celebici"),** Judgement, Case No. IT-96-21, 16 November 1998, paras. 1203 and 1232; **Prosecutor vs. Jelisic ("Brcko"),** Judgement, Case No. IT-95-10, 14 December 1999, para. 116.

[156] See similarly **Möller**, **C.** (2003). Völkerstrafrecht und Internationaler Strafgerichtshof - kriminologische, straftheoretische und rechtspolitische Aspekte. Münster, LIT Verlag. Pp 485 et seq who believes that specific prevention has been accorded a relatively subordinate role in international criminal law.

[157] See e.g. **Prosecutor vs. Blaskic ("Lasva Valley),** Appeal Judgement, Case No. IT-95-14, 29 July 2004, para. 678 , **Prosecutor vs. Mucic et. al. ("Celebici"),** Appeal Judgement, Case No. IT-96-21, 20 February 2001, para. 806; **Prosecutor vs. Kunarac et al. ("Foca")**, Judgement, Case No. IT-96-23, 22 February 2001, para. 844.

[158] See similarly **Gehrken**, **J.** (2000). "Billig und gerecht? Verfahren zwischen Rechtsstaatlichkeit und Effizienz." Forum Recht **3**.; **Möller**, **C.** (2003). Völkerstrafrecht und Internationaler Strafgerichtshof - kriminologische, straftheoretische und rechtspolitische Aspekte. Münster, LIT Verlag. At page 478.

also been stated that rehabilitation of the convicted perpetrator may be considered secondary, since the person concerned is in general held to be socially integrated, his deeds committed in extraordinary situations that cannot be repeated in this form.[159] It has even been said that the Rome Statute seems to have left behind one of the pillars of modern criminal law consisting of the rehabilitation of convicted persons.[160]

6. Norm stabilization/restoration of the rule of law

The wording of the preamble "to prevent such crimes" can be interpreted as referring, not only and maybe not even primarily to deterrence, but to the creation and reinforcement of an international awareness of law, to promote respect for the rule of law and thus ultimately to prevent crimes.[161] Another part of the wording[162] even more obviously points out that the ICC intends to enforce awareness and respect for the rule of law.

At the IMT of Nürnberg, this purpose was already mentioned by the Prosecutor, saying that one means of reconstructing was the reaffirmation of fundamental standards of law.[163] In contrast, this purpose was not pivotal before the ICTs.

It has been argued that the aim of international criminal justice is to restore the values of the international community and the rule of law.[164] It has also been suggested that another important aim is to delegitimize systems of power.[165]

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[159] See **Stolle**, **P.** and **T. Singelnstein** (2007). On the Aims and Actual Consequences of International Prosecution of Human Rights. International Prosecution of Human Right Crimes. W. Kaleck, M. Ratner, T. Singelnstein and P. Weiss. Heidelberg, Springer**:** 37-52. At page 40.

[160] **Olasolo**, **H.** (2005). The Triggering Procedure of the International Criminal Court. Leiden Boston, Martinus Nijhoff Publishers. At page 23.

[161] See **Werle**, **G.** (2005). Principles of International Criminal Law. The Hague, TMC Asser Press. At page 31; **Triffterer**, **O.** (1999). Commentary to the Preamble. Commentary on the Rome Statute of the International Criminal Court. O. Triffterer. Baden-Baden, Nomos Verlag**:** 1-16. At page 12.

[162] "Resolved to guarantee lasting respect for and the enforcement of international justice".

[163] See Trials of War criminals before the NMT under Control Council Law No. 10, Vol 6, page 974.

[164] See **Safferling**, **C. J. M.** (2003). "Das Opfer völkerrechtlicher Verbrechen." Zeitschrift für die gesamte Strafrechtswissenschaft **115**: 352-384. At page 383; similarly **Küpper**, **H.** (2004). Kollektive Rechte in der Wiedergutmachung von Systemunrecht. Frankfurt am Main, Peter Lang GmbH-Europäischer Verlag

On the other hand it has also been suggested that there is no empirical basis to prove such an impact of international criminal law. [166] It has been said thereto that a firm and stable international legal order and a common awareness of such an order did not exist at present and had to be established foremost. International criminal law did not possess the necessary assertiveness to be reckoned as universally accepted.[167]

While there is truth in this statement, we must also take into account the fact that international criminal law is still in its infancy. In the longer term, the educational and normative value of reasoned judgements of a court vested with international legitimacy will probably generate greater moral and legal suasion against the commission of crimes under international law.[168] Correspondingly many authors indicate that this purpose could become more and more important. [169]

Thus, the wording of the preamble and the eventual establishment of a permanent international criminal court after years of an almost entire lack of binding norms allow us to conclude that the creation and reinforcement of an international awareness of law and the promotion of respect for the rule of law and ultimately the prevention of crimes are surely among the objectives of punishment before the ICC. This remains true even if a common awareness of a firm and stable international legal order does not yet exist.

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der Wissenschaften. At page 1096; see also **Bassiouni**, **M. C.** (1998). The Statute of the International Criminal Court: A Documentary History. Ardsley.

[165] See **Hannah**, **A.** and **K. Jaspers (**1993). Briefwechsel 1926-1969 at page 90. cited according to **Paech, N.** (2002). Sinn und Missbrauch internationaler Strafgerichtsbarkeit. Blätter für deutsche und internationale Politik**4**: 440 et seq. At page 441.

[166] **Günther**, **K.** (1996). ""Schuld" und Erinnerungspolitik." Universitas **12**: 1161-1173. Pp. 1162 et seq.

[167] **Möller**, **C.** (2003). Völkerstrafrecht und Internationaler Strafgerichtshof - kriminologische, straftheoretische und rechtspolitische Aspekte. Münster, LIT Verlag. At page 521.

[168] See similarly **Garkawe**, **S.** (2001). "The Victim-related provisions of the Statute of the International Criminal Court: A victimological analysis." International Review of Victimology **8**: 269-289. At pages 273, 274.

[169] See **Nemitz**, **J. C.** (2002). Strafzumessung im Völkerstrafrecht. Freiburg im Breisgau, edition iuscrim. At page 18; **McDonald**, **A.** (2002). The Role of Victims and Witnesses in International Criminal Trials. Treaty Enforcement and International Cooperation in Criminal Matters with special reference to the Chemical Weapons Convention. R. Yepes-Enriques and L. Tabassi. The Hague, T.M.C. Asser Press**:** 257-276. At page 239; **Jescheck**, **H. H.** (1952). Die Verantwortlichkeit von Staatsorganen nach Völkerstrafrecht. Bonn. At page 195.

Whether such an awareness will develop will surely depend on the acceptance gained by the ICC through its decisions and judgements.

7. Reconciliation

There is no direct reference to "reconciliation" as a purpose of punishment in the preamble. International Criminal Law protects "peace, security and the well-being of the world", referring to the accepted basic, inherent values of the international community.[170] Reconciliation could be one means to achieve the goals mentioned, however, the preamble does not go into any further detail on the intended means to achieve peace, security and the well-being of the world. Still, some authors argue that collective reconciliation is thereby included as one of the objectives of the ICC[171], that a reconciliatory role inheres in the aims of the ICC beyond the punitive function, that the ICC therewith goes beyond what is expected from national trials.[172] It has even been said that reconciliation is one of the most important purposes of punishment in this context, that reconciliation is indispensable because peace and security cannot be achieved through punishment and retribution alone.[173]

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[170] See **Triffterer**, **O.** (1999). Commentary to the Preamble. Commentary on the Rome Statute of the International Criminal Court. O. Triffterer. Baden-Baden, Nomos Verlag**:** 1-16. At page 13.

[171] See for example **Stehle**, **S.** (2006). Das Strafverfahren als immaterielle Wiedergutmachung. Frankfurt am Main. At page 40; compare also **Scomparin**, **L.** (2003). La victime du crime et la juridiction pénale internationale. La justice pénale internationale entre passé et avenir. M. Chiavario. Paris, Dalloz-Giuffrè**:** 335-352. At page 340.

[172] **McDonald**, **A.** (2002). The Role of Victims and Witnesses in International Criminal Trials. Treaty Enforcement and International Cooperation in Criminal Matters with special reference to the Chemical Weapons Convention. R. Yepes-Enriques and L. Tabassi. The Hague, T.M.C. Asser Press**:** 257-276. At page 259; **Haslam**, **E.** (2004). Victim Participation at the International Criminal Court: A Triumph of Hope over Experience? The Permanent International Criminal Court. Legal and Policy Issues. D. McGoldrick, P. Rowe and E. Donnelly. Oxford and Portland Oregon, Hart Publishing**:** 315-334. At page 315; **Fife**, **R. E.** (1999). Art. 77, Applicable penalties. Commentary on the Rome Statute of the International Crimina Court. Observers' Notes, Article by Article. O. Triffterer. Baden-Baden, Nomos Verlagsgesellschaft**:** 985-998. At page 986. **Pinto**, **M. C. W.** (2003). Truth and consequences or truth and reconciliation? Some thoughts on the potential or official truth commissions. Man's Inhumanity to Man. Essays on International Law in Honour of Antonio Cassese. L. C. Vohra, Y. Featherstone, O. Fourmyet al. The Hague, Kluwer Law International. At page 701.

[173] **Stehle**, **S.** (2006). Das Strafverfahren als immaterielle Wiedergutmachung. Frankfurt am Main. At page 40.

Reconciliation has on the other hand been said to be merely a side effect of the restoration of the values of the international community.[174]

Others seem to view reconciliation as a subject reserved to institutions like the Trust Fund or Truth Commissions[175] and ascribe a purely retributive function to International Criminal Tribunals.[176]

The incorporation of norms on victim participation and reparations into the Rome Statute could be indicative of the incorporation of restorative elements[177] into this body of rules, which also involve the concept of reconciliation. However, this line of reasoning could lead to a circular argument if victim participation for instance was only introduced to serve the purpose of retribution. As concerns reparations, they however clearly serve a reconciliatory goal.[178] It seems that the ICC's aims are therefore not exclusively retributive but that restorative aims are included to an extent which is, as yet undetermined.

On the ICC's website, section "victims and witnesses" one can read that "the victim-based provisions within the Rome Statute provide victims with the opportunity to have

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[174] See **Safferling**, **C. J. M.** (2003). "Das Opfer völkerrechtlicher Verbrechen." Zeitschrift für die gesamte Strafrechtswissenschaft **115**: 352-384. At page 384.

[175] **Glickman**, **S.** (2004). "Victim's Justice: Legitimizing the Sentencing Regime of the ICC: Dorsey and Whitney Student Writing Prize in Comparative and International Law Best Note Award Winner." Columbia Journal of Transnational Law **43**: 229-268. At page 242.

[176] **Eisnaugle**, **C. J. N.** (2003). "An International Truth Commissions: *Utilizing Restorative Justice as an Alternative to Retribution*." Vanderbilt Journal of Transnational Law **36**(1): 209-242, **Glickman**, **S.** (2004). "Victim's Justice: Legitimizing the Sentencing Regime of the ICC: Dorsey and Whitney Student Writing Prize in Comparative and International Law Best Note Award Winner." Columbia Journal of Transnational Law **43**: 229-268. At pages 229, 230.

[177] There are different approaches to explain the conception of "restorative justice". Summarizing it can be said that the primary objective of restorative justice is to correct violations of relationships between people and to restore relationships. As such, it necessarily involves victims and survivors, perpetrators and the community, in the quest for a level of justice that promotes repair, trust building and also reconciliation. Quod vide in detail **Eisnaugle**, **C. J. N.** (2003). "An International Truth Commissions: *Utilizing Restorative Justice as an Alternative to Retribution*." Vanderbilt Journal of Transnational Law **36**(1): 209-242. Pp 211 et seq.

[178] See **Dwertman, E.** The Reparations System of the International Criminal Court, its implementiation, possibilities and limitations, forthcoming; **Shelton**, **D.** (2005). Remedies in International Human Rights Law. Oxford, Oxford University Press. At page 320.

their voices heard and to obtain, where appropriate, some form of *reparation* for their suffering. It is this balance between retributive and restorative justice that will enable the ICC, not only to bring criminals to justice but also to help the victims themselves obtain justice."[179] This can be understood as another indication that restorative justice is intended to be included in some form or another although the website of course is in no way legally binding. A restorative function was also already mentioned at the Preparatory Commissions.[180]

The ICTY has not explicitly cited reconciliation as a purpose of punishment but has occasionally made reference to the mission of the Tribunal described as, among other things, "restoring and keeping peace in the former Yugoslavia".[181] However, even if the ICTY has sometimes been ascribed a reconciliatory role[182], it has also been stated, that an implementation of this purpose has not been achieved in reality.[183]

In summary, we may observe that there are indications that restorative and thus also reconciliatory elements will be included in procedures before the ICC.

More precisely it should be said that one purpose will be collective reconciliation.[184] Finally, when discussing "reconciliation" it should be kept in mind that the ICC can only *promote* reconciliation. But a successful reconciliation also requires the approval of

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[179] See http://www.icc-cpi.int/Menus/ICC/Structure+of+the+Court/Victims/.

[180] See **Lee**, **R. S.** (2001). The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence. Ardsley, New York, Transnational Publishers. At page 457.

[181] See **Prosecutor vs. Mucic et. al ("Celebici"),** Judgement, Case No. IT-96-21, 16 November 1998, paras. 1203 and 1232; **Prosecutor vs. Jelisic ("Brcko"),** Judgement, Case No. IT-95-10, 14 December 1999, para. 116.

[182] See **McDonald**, **A.** (2002). The Role of Victims and Witnesses in International Criminal Trials. Treaty Enforcement and International Cooperation in Criminal Matters with special reference to the Chemical Weapons Convention. R. Yepes-Enriques and L. Tabassi. The Hague, T.M.C. Asser Press**:** 257-276. At page 259

[183] See **Stover**, **E.** (2005). The Witnesses. War Crimes and the Promise of Justice in The Hague. Philadelphia, University of Pennsylvania Press. At page 15 pointing out that there is no direct link between criminal trials and reconciliation, although admitting that this could changer over time.

[184] The preamble by mentioning "peace, security and the well-being of the world" does not speak of individual reconciliation but rather aims at a superordinate reconciliation process.

victims as much as the perpetrator and also society's acknowledgement and reconciliation with the past.[185]

8. Truth-finding/Acknowledgment

Another purpose of punishment specific to international criminal law could be that of truth-finding and the acknowledgment of past injustices by the Court through the conviction of the perpetrator.

It is important to first explore the meaning of "truth finding". The duty of a criminal court is obviously to discover the facts concerning specific cases: did the accused commit the offences for which he or she is being prosecuted? This fact-finding procedure is nevertheless not explicitly cited as a "purpose" of the trial in national contexts.

The question is then whether there is a special relevance to the acknowledgment of injustices in the international context. Alternatively, does "truth-finding" maybe allude to a more comprehensive form of fact-finding, signifying the production of a more detailed record of past events, something akin to a historical record?

There is no evidence to be found in the wording of the preamble that any of the aforementioned truth-finding processes are envisaged as a purpose of punishment before the ICC.

As for the IMTN it has been said that one goal which it aims for is to ascertain the truth.[186]

The ICTs did not mention such a purpose. Furthermore, in practice the ICTY adhered strictly to the facts concerning the person of the accused.

Many authors do not even refer to a purpose such as "truth-finding", even those promoting a restorative concept do not always go into this topic. Others do confirm that

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[185] See **Hauser**, **M.** (1998). Die Perspektive der Opfer. Nürnberg, Nürnberger Menschenrechtszentrum**:** 47-53. At page 47.

[186] Trials of war Criminals Before the Nuernberg Military Tribunals Under Control No. 10, Volume 2, at page 859.

truth-finding and an official acknowledgment of past injustices constitute a specific purpose of punishment in international criminal law[187], Donat Cattin even cites the search for truth, not retribution or punishment as the most significant goal of the ICC proceedings.[188]

However, concerns have been voiced that courts of law should not be used for "history lessons", lest proceedings turn into or be seen as show trials.[189]

The establishment of something akin to a wider historical truth or record is probably far too complex and costly for the ICC to be a realistic option. Providing a historic record could also easily conflict with the rights of the accused because proceedings could become longer than necessary to prove his or her guilt or innocence of the specific crimes in question.

And as Safferling has rightly observed: a public prosecution will contribute to the finding of the truth, although a trial is not a convention of historical experts and the aim of the trial is not to establish the entire picture of the historical events.[190] Consequently, sticking to the facts and the guilt or innocence of the accused in each case is probably the only feasible option for the Court. Furthermore, it is arguable that this is what the Court was designed for and is the only thing a Criminal Court is capable of.[191]

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[187] **Werle**, **G.** (2005). Principles of International Criminal Law. The Hague, TMC Asser Press. At Page 31; **Dembour**, **M.-B.** and **E. Haslam** (2004). "Silence Hearings? Victim-Witnesses at War Crimes Trials." European Journal of International Law **15**(1): 151-177. At page 152; **Rohde**, **D.** (1997). Die letzten Tage von Srebrenica: was geschah und wie es möglich wurde. Reinbek, Rowohlt Taschenbuch Verlag. At page 405.

[188] **Donat-Cattin**, **D.** (1999). Art. 68 "Protection of victims and witnesses and their participation in the proceedings". Commentary on the Rome Statute of the International Criminal Court. Observers´Notes Article by Article. O. Triffterer. Baden-Baden, Nomos Verlagsgesellschaft. At page 873.

[189] See **Buruma**, **I.** (1994). The wages of guilt. Memories of war in Germany and Japan. London, Phoenix Press. At page 181.

[190] **Safferling**, **C. J. M.** (2004). "Can Criminal Law be the Answer to Massive Human Rights violations?" German Law Journal **5**(12): 1469-1488.At page 1482.

[191] See similarly **Werle**, **G.** (1992). "Der Holocaust als Gegenstand der deutschen Strafjustiz." Neue Juristische Wochenschrift **40**: 2529-2535. At page 2529.

Additionally, if the ICC had such an important role in recording history, this could be problematic insofar as it would "produce" history from the view of an institution external to the conflict, which is on top situated far from the setting of the crimes. It is highly questionable whether the recording of "history", not to mention coming to terms with it can be accomplished externally to the society where it happened. History has a societal dimension that cannot be dealt with solely by judicial instruments.

If with a conviction of an accused the ICC aims to acknowledge injustices in certain cases it should not be forgotten that this can only represent a very small proportion of the whole historical process as only a few persons will be accused and only for the commission of crimes that are prosecuted before the ICC. The ICC will most probably not go beyond this.

Whether the acknowledgement of this "extract of truth" will have a positive effect will depend on the acceptance of the ICC's decisions and judgements and on the degree to which a national truth-finding or history-building process will accept and adopt this "truth".

From the wording of the preamble it seems that truth-finding in the described way will not be one of the primary purposes of the ICC. In any case, the Court will not be able to avoid contributing to the shaping of history[192] and should react to this fact in a responsible way.

9. Victim-related purpose of punishment

It is further possible that there is another purpose of punishment, namely a victim-related purpose of punishment that goes beyond of what is achieved by the purposes of "reconciliation" or "truth finding".

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[192] See thereto also **Osiel**, **M.** (1997). Mass atrocity, collective memory, and the law. New Brunswick, New Jersey, Transaction Publishers. At page 2 who opines that a war crimes trial cannot avoid contributing to the shaping of collective memory.

There are different options which might be considered when looking at the content of such a purpose. Proposals on this issue include "giving a voice to victims"[193], "doing justice for victims"[194], "acknowledging the suffering of victims"[195] or "restoration and healing of victims"[196]. These proposals at first view seem to serve a similar purpose but are not clear as to their exact meaning. These catchwords could comprise completely different objectives and cover a wide range of aims.

First, it seems conceivable that by "doing justice for victims" for instance or "restoration and healing" what is meant is that a criminal process has the aim of satisfying victims' individual interests such as individual retribution, reconciliation, healing etc.. Another inherent association could be that the aforementioned general objectives like retribution are pursued explicitly "in the name of victims" or "on behalf of victims" while giving victims limited or no influence on the process. Another interpretation would be that "justice for victims" is seen as a necessary means of accomplishing other aims such as collective reconciliation. It would therefore be a necessary precondition for the main objective of the proceedings rather than an original objective[197] even if personal interests may be satisfied as a side effect.

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[193] **McDonald**, **A.** (2002). The Role of Victims and Witnesses in International Criminal Trials. Treaty Enforcement and International Cooperation in Criminal Matters with special reference to the Chemical Weapons Convention. R. Yepes-Enriques and L. Tabassi. The Hague, T.M.C. Asser Press**:** 257-276. At page 259.

[194] **Bachrach**, **M.** (2000). "The Protection and Rights of Victims." The International Lawyer **34**: 7-21. At page 7.

[195] **Werle**, **G.** (2005). Principles of International Criminal Law. The Hague, TMC Asser Press. At Page 31. see also **Heikkilä**, **M.** (2004). International criminal tribunals and victims of crimes. Turku, Institute for Human Rights, Abo Akademi University. At page 68.

[196] **Möller**, **C.** (2003). Völkerstrafrecht und Internationaler Strafgerichtshof - kriminologische, straftheoretische und rechtspolitische Aspekte. Münster, LIT Verlag. At page 606.

[197] See similarly **Donat-Cattin**, **D.** (1999). Art. 68 "Protection of victims and witnesses and their participation in the proceedings". Commentary on the Rome Statute of the International Criminal Court. Observers´Notes Article by Article. O. Triffterer. Baden-Baden, Nomos Verlagsgesellschaft. At page 873 who deems any form of positive contribution from victims indispensable for the accomplishment of the Court's most important function which according to him is the search for truth.

Victims are mentioned in the preamble of the Rome Statute[198], but there is no reference to a victim-related purpose of punishment.

However, it is significant that "doing justice for victims" was often mentioned as an objective at the Rome Conference.[199] Furthermore, provisions on victim participation and reparation are also contained in the Statute and Rules.

In one of its decisions an ICC Chamber has stated that "the Statute grants victims an independent voice and role in the proceedings before the Court", classifying this as an object and purpose of victim participation but not as a general object of the proceedings.[200]

Similarly in the victim information booklet it is said that by presenting their own views and concerns to the judges, victims were given a voice in the proceedings that was independent of the Prosecutor. This would help the judges to obtain a clear picture of what happened to them or how they suffered, which they might decide to take into account at certain stages in the proceedings thus eventually leading to an impact on the way proceedings were conducted and in the outcomes.[201]

A victim-related objective has not been mentioned in decisions before the ICTY, only on the website is "rendering justice to victims" mentioned as part of the mission of the ICTY.[202] However, the website does not form part of the official documents of the Tribunal.

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[198] See Preamble, saying "Mindful that during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity."

[199] See, e.g. UN Press Releases L/2881 and L/2883; see also **Timm**, **B.** (2001). The Legal Position of Victims in the Rule of Procedure and Evidence. International and National Prosecution of Crimes under International Law. H. Fischer, C. Kreß and S. R. Lüder. Berlin, Berlin Verlag**:** 289-307. At page 289.

[200] See PTC I, **Situation in the Democratic Republic of the Congo**, Decision on the applications for participation in the proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6 of 17 January 2006, Case No. ICC-01/04, paras. 50, 51.

[201] See Victim booklet at page 12.

[202] See www.icty.org, "the ICTY at a Glance→General Information.

Although victim participation has been incorporated into many national criminal law proceedings discussions on the purpose of punishment do not refer to the victim of the crime.[203]

Thus, we may say that the inclusion of provisions on victim participation in the Statute indicates that any possible victim-related purpose of punishment certainly goes beyond merely punishing on behalf of the victims.[204]

With regard to the question of whether the individual interests of victims can form part of a punishment purpose, it is first necessary to ascertain whether individual interests can be accommodated in international criminal law at all before examining the relevant legal materials. Whether international criminal law rather protects collective or also individual concerns is being discussed.[205]

It has been opined that international criminal law has the primary task of (directly) protecting international peace and security but at the same time protects the legal values of individuals.[206]

The Secretary- General of the UN in an inaugural meeting of the UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court declared in his opening speech that the "overriding interest must be that of the victims, and of the international community as a whole."[207], thereby on the first view giving the victims interests the first place.

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[203] See for instance for the German system **Hörnle**, **T.** (2006). "Die Rolle des Opfers in der Straftheorie und im materiellen Strafrecht." Juristische Zeitung **19** : 950-958. At page 951.

[204] See also **Heikkilä**, **M.** (2004). International criminal tribunals and victims of crimes. Turku, Institute for Human Rights, Abo Akademi University. At page 68.

[205] **Werle**, **G.** (2005). Principles of International Criminal Law. The Hague, TMC Asser Press. At page 28.

[206] **Triffterer**, **O.** (1999). Preliminary Remarks. Commentary on the Rome Statute of the International Criminal Court. Observers' Note, Article by Article. O. Triffterer. Baden-Baden, Nomos Verlagsgesellschaft**:** 17-50. At page 26.

[207] See UN Doc. Press Release SG/SM/6597, L/2871.

There are several arguments for the predication that individual as well as collective interests are being protected. First it can be said that the restoration of the interests of individual victims is a necessary precondition for the "healing" of a society as a whole.[208] One may see from the Statute and Rules that the hardships, needs and the rights of victims of crimes are now on an equal footing to the international community's interest or right on punishment.[209] It has been stated that the crimes contained in the statute did not only protect collective but also individual interests. It could further be argued that individual persons are being accused before the ICC and that therefore on the other side also individual interests are being protected.

Others negate the inclusion of legally protected rights of individuals in general.[210] Thereto it has been said that the individual is first of all „victim" in his or her quality as member of the respective group.[211]

Pertaining to the aspect that the guilt of the perpetrator is being individualized it has been replied that this does not mean that there is also an individualization of victims. International law applied to the entirety of the world community and the aim of international criminal law was to restore the values of international community through punishing a crime against mankind not against an individual or rather only against an individual as part of a collective.[212] Individualizing victims would set aside the predominantly collective character of the crime and would require a selection of

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[208] **Möller**, **C.** (2003). Völkerstrafrecht und Internationaler Strafgerichtshof - kriminologische, straftheoretische und rechtspolitische Aspekte. Münster, LIT Verlag. At page 604; **Minow**, **M.** (1998). Between Vengeance and Forgiveness. Boston, Beacon Press. At page 117.

[209] **Möller**, **C.** (2003). Völkerstrafrecht und Internationaler Strafgerichtshof - kriminologische, straftheoretische und rechtspolitische Aspekte. Münster, LIT Verlag. At page 601.

[210] **Lagodny**, **O.** (2001). "Legitimation und Bedeutung des Internationalen Strafgerichtshofes." Zeitschrift für die gesamte Strafrechtswissenschaft **113**(4): 800-826. At page 803; **Safferling**, **C. J. M.** (2003). "Das Opfer völkerrechtlicher Verbrechen." Zeitschrift für die gesamte Strafrechtswissenschaft **115**: 352-384. Pp 369 et seq.

[211] **Safferling**, **C. J. M.** (2003). "Das Opfer völkerrechtlicher Verbrechen." Zeitschrift für die gesamte Strafrechtswissenschaft **115**: 352-384. At page 371.

[212] Ibid. At page 383.

individual victims from the collective of victims being necessarily arbitrary.[213] The crimes contained in the Rome Statute always embodied a collective element. It was accordingly inappropriate to utilize international criminal procedure for the purpose of rehabilitating individual victims.[214]

Again others propose that there should be a distinction between the different international crimes in determining whether only collective or also individual interests are protected.[215]

It is submitted that it is correct to view the objective goal of international criminal as the defense and restoration of collective interests.[216] This does not mean that individual interests are not protected at all: The fate of individual persons shall by no means be negated or ignored. However, this does not alter the fact that before the ICC their fate will only be regarded within a larger context - the primary goal of the ICC's procedures is to defend and restore collective interests. The protection or restoration of individual interests will often correspond with the defence or restoration of collective interests. However, it is conceivable that the enforcement of individual interests in the proceedings could indeed conflict with collective interests if the rights of other individuals are neglected leading to an overall undesirable result.

The Inter-American Court has stated that the fact that a right may take on a collective or general character intended to benefit the public as a whole does not mean that an

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[213] Ibid. At page 370.

[214] Ibid. At page 370 claims that this is the case in spite of acknowledging that the definiton in Rule 85 RPE refers to invidual victims (natural persons).

[215] **Werle**, **G.** (2005). Principles of International Criminal Law. The Hague, TMC Asser Press. At page 28.

[216] This can be seen for example in the preamble where the interests named as protected by international law paramountly are such of the international community. It is said that International Criminal Law generally protects "peace, security and the well-being of the world", refering to the accepted basic, inherent values of the international community. The rights of individuals on the other hand are only mentioned: "Mindful that during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity". The crimes punished before the ICC also support this idea: Crimes against humanity and genocide for example are clearly connected to mass victimization or collective victimization, even if the victims of course, are natural persons. As for war crimes Art. 8 names modalities of criminal acts that seem possible to be addressed to individual victims as to a victim collective.

individual may not have a standing to assert that right.[217] Furthermore the Statute and Rules explicitly provide for the rights of individual victims.[218]

In practice the solution might be that personal interests will be considered for obtaining a superordinate interest but that maybe not every individual interest can or will be considered.[219] As an example, efforts to the healing of single persons could be seen as useful in the greater context of preparing the grounds for reconciliation. It will probably be necessary to consider the merits of a trade-off between considering certain individual interests more intensely than others thereby neglecting other individual interests or whether it is more desirable and effective to consider as many individual interests as possible but in a less intense manner.

As a rule of thumb it can be said that it will always be necessary to weigh up whether considering individual interests also serves and does not conflict with collective interests. Consequently, it is clear, that individual interests will not be the primary focus of proceedings and that such interests may be considered within the overall context but cannot explicitly be part of a punishment purpose. The consideration of individual interests does thus most probably not reach beyond being a possible side-effect of collective interests.

The next question must be whether "doing justice for victims" will be a purpose of punishment in the sense that the ICC deems it necessary to pursue prosecutions explicitly for the victims and ultimately for the purpose of achieving reconciliation while also giving victims the chance to participate in the proceedings

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[217] See for example **Bámaca Velásquez Case**, Judgement of 25 November 2000, Ser. C., No. 70, at page 94 et seq. (concurring opinions of Judges Hérnan Salgado Pesantes and Sergio García Ramírez).

[218] See for instance Rule 97 explicitly referring to individual reparations.

[219] This thesis is being underlined by the fact that victims do have a right to participation, but not a right that is indeed enforceable: in fact, if an application to participation is rejected, there is no right to review this decisions, see thereto below pages 168 et seq.

As already shown it can be assumed that the ICC will not commit itself only to retributive ideas but will also aim to achieve reconciliation. For that purpose, the Court will therefore most probably see victim participation as a necessary constituent in the process.[220]

It remains to be seen whether the ICC will consider "doing justice for victims" as an own, independent purpose of punishment or rather as a component of other purposes. Technically, it appears that this is of little significance and what is most important is that "doing justice for victims" will form part of the purposes of punishment in the manner described above. Of course, it may be desirable for victims that there be a purpose of punishment which would make explicit reference to their concerns. However, only if the extent of the purpose were defined and its achievement ensured would such an pronouncement be persuasive or desirable.

10. Conclusion

In conclusion, it can be said that the "classic" purposes of punishment, retribution and deterrence, will also play their part and be important purposes of punishment before the ICC. Meanwhile other "classic" purposes of punishment known from national law, that is stigmatization, incapacitation and rehabilitation of the perpetrator will remain as secondary aims.

It seems that purposes of punishment such as norm stabilization, reconciliation and maybe to a certain extent also truth finding and doing justice for victims will become more important in comparison to previous International Criminal Tribunals. [221] How,

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[220] See pages 51 et seq., see also **Stehle**, **S.** (2006). Das Strafverfahren als immaterielle Wiedergutmachung. Frankfurt am Main. At page 40 who deems victim participation a indispensable component for achieving reconciliation.

The weight given to the norms on victim participation and reparation before the ICC, too, support this contention; compare also **Morris**, **M.** (2000). Complementarity and its discontents: states, victims, and the International Criminal Court. International Crimes, Peace, and Human Rights: The Role of the International Court. D. Shelton. Ardsley, New York, Transnational Publishers**:** 177-201. Pp 180 et seq.

[221] As for a similar evaluation see **Bottigliero**, **I.** (2004). Redress for Victims of Crimes Under International Law. Leiden/Boston, Martinus Nijhoff Publishers. At page 37 who describes the the ICC Statute as "based on a compromise approach bringing tighter focus on victims of genocide, crimes against humanity and war crimes, while preserving the essential retributive function of international criminal justice".

ultimately, the individual purposes will be weighted in comparison to each other remains to be seen like the question as to how potential conflicts between the individual purposes[222] can and will be resolved.

II. Object and purpose of victim participation before the ICC

In the following section the purposes of victim participation will be examined while having regard to the conclusions drawn on the nature and purposes of punishment above.

The Statute and the RPE set out when victims may participate they are silent on the purposes of participation. Little guidance is to be found on this matter elsewhere as there are hardly any precedents on victim participation in international law to which one could refer.

Academic commentary also provides little assistance on this question insofar as it concerns the situation before the ICC. If it is for instance said that the goal of victim participation was to be seen therein to ensure that all victims had access to the justice system as well as support throughout the justice process [223] without further clarifying to what end such access is wanted this does not contribute much to finding out about the aim and purpose.

1. Aims in national contexts

It is possible that the purpose of victim participation before the ICC may be clarified with regard to national contexts. However, such comparisons must be performed with care, as the purposes of punishment already, as has been shown, do not necessarily coincide with those of international law.[224] Furthermore national solutions to victim participation are usually very different in their scope and objects and are not directly comparable.

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[222] See for instance **Shelton**, **D.** (1996). "Righting wrongs: Reparations in the Articles on State Responsibility." American Journal of International Law **96**: 833-856. At page 837 who raises this point in the context of reparations.

[223] **UNODCCP** (1999). Handbook on Justice for Victims, on the Use and Application of the Declaration of Basic Pronciples of Justice for Victims of Crime and Abuse of Power. New York, Center for International Crime Prevention. At page 41.

[224] See above pages 30 et seq.

Nevertheless, the lack of information on the topic in international law justifies a short view on national legal systems' approaches to this area.

In Austria, there are different ways in which a victim can participate, i.e. as a civil claimant, private prosecutor or subsidiary prosecutor. The institution of the subsidiary prosecutor - which is not directly comparable to victim participation before the ICC as it contrary to participation before the ICC allows for real participation as a party- is intended primarily to act as a corrective against the monopoly that the public prosecutor has over the prosecution of offences.[225]

In England or Ireland the philosophy behind private prosecution is that it is intended to function as a constitutional safeguard against arbitrary prosecution policies of the Crown Prosecution Service and Director of Public Prosecutions respectively.[226]

In Germany there is private prosecution[227] and subsidiary prosecution[228] and it is the latter which is most comparable to victim participation before the ICC. It has been said that this participation instrument incorporates an element of satisfaction [229] and also of control and of verification. The victim's rights to question, to be present or rights to present evidence are mainly related to a control function.[230]

In France the victim of an offence may come before the criminal court as a *partie civile*, either by becoming party to a prosecution already started, or by starting one him or herself. The objectives of bringing such a civil action before a criminal court are to obtain

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[225] See **Foregger**, **E.** and **E. E. Fabrizy** (2006). Strafgesetzbuch. Wien, Manz. At page 48.

[226] **Brienen**, **M. E. I.** and **E. Hoegen** (2000). Systems the implementation of Recommendation (85) 11 of the Council of Europe on the Position if the Victims in the Framework of Criminal Law and Procedure, Wolf Legal Productions. At page 80.

[227] „Privatklage" see §§ 374 et seq. of the German code of criminal procedure.

[228] „Nebenklage" see §§ 395 et seq. of the German code of criminal procedure.

[229] **Pfeiffer**, **G.** (2003). Karlsruher Kommentar zur Strafprozessordnung. München, C.H. Beck.At page 111.

[230] See **Schöch**, **H.** (1984). "Die Rechtsstellung des Verletzten im Strafverfahren." Neue Zeitschrift für Strafrecht **9**: 385-391. At page 388.

a ruling on the guilt of a person and to remedy the harms caused by awarding compensation for the damage suffered[231] but also to observe the prosecution.[232]

In Switzerland control is named as the main objective of victim participation.[233]

Impact statements in the United States which are structurally very different from subsidiary prosecution or the "*partie civile"* and it has been said that their function is merely to provide information about the effects of the crime.[234]

In conclusion, it may be said that there are some purposes that are being named frequently in national contexts such as the purpose of controlling the authorities. However, when viewing the different objectives it should not be forgotten that the instruments vary greatly in the different legal systems. Furthermore it must be remembered that the law in many countries does not in any way circumscribe the nature and aims of participation in the trial by the injured party so that these are not always completely clear.[235] Furthermore, it should be remembered that in an international context, the purposes of punishment are not the same already and that different aims may also be found for victim participation. Therefore, it is clear that the main sources of guidance on the purposes of victim participation will have to be the conclusions on the purposes of punishment and the interpretation of the Rules on participation before the ICC.

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[231] **Dervieux**, **V.** (2002). The French System. European Criminal Procedures. M. Delmas-Marty and J. R. Spencer. Cambridge, Cambridge University Press**:** 218-291. At pages 226, 227; see also **Brienen**, **M. E. I.** and **E. Hoegen** (2000). Systems the implementation of Recommendation (85) 11 of the Council of Europe on the Position if the Victims in the Framework of Criminal Law and Procedure, Wolf Legal Productions. At page 319.

[232] **Stehle**, **S.** (2006). Das Strafverfahren als immaterielle Wiedergutmachung. Frankfurt am Main. At page 91.

[233] **Hauser**, **R.** and **E. Schweri** (1999). Schweizerisches Strafprozessrecht. Basel, Helbing&Lichtenhahn. At page 134.

[234] **LaFave**, **W. R.** and **J. H. Israel** (1992). Criminal Procedure. St. Paul, Minnesote, West Publishing Company. At page 1117.

[235] See for Italy: **Henham**, **R.** and **G. Mannozzi** (2003). "Victim Participation and Sentencing in England and Italy: A Legal and Policy Analysis." European Journal of Crime, Criminal Law and Criminal Justice **11**(3): 278-317. At page 289.

2. Giving a voice to victims

The idea of "giving a voice to victims" has been mentioned relatively frequently[236] and has been the only purpose of victim participation mentioned by the ICC itself.[237] "Giving a voice to victims" shall therefore be examined as the first possible aim of victim participation.

There are different possibilities as to how to interpret this term. On the one hand it could mean to grant victims a right to a say in the way that they may express legal opinions or suggestions, maybe also through a legal representative. On the other hand the term "voice" could be understood in a much more literal sense as giving victims the possibility to appear in person and tell their stories.

As mentioned above given that the Prosecutor's actions will most probably be governed by the desire to procure a successful conviction, it is possible that victims' interests and the interests of the Prosecutor will not coincide.[238] For this reason it has been argued that an independent voice of the victims consists in the right to have the prosecutor's right to punitive justice balanced with the right of victims to restorative justice.[239] Similarly others have suggested that the rationale behind provisions on victim participation is also often to make the victim or his or her representative a watchdog over the fairness of the proceedings with respect to the victim's personal interest[240] and to enhance the objectivity

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[236] See for example **McDonald**, **A.** (2002). The Role of Victims and Witnesses in International Criminal Trials. Treaty Enforcement and International Cooperation in Criminal Matters with special reference to the Chemical Weapons Convention. R. Yepes-Enriques and L. Tabassi. The Hague, T.M.C. Asser Press**:** 257-276. At page 259.

[237] See PTC I, **Situation in the Democratic Republic of the Congo**, Decision on the applications for participation in the proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6 of 17 January 2006, Case No. ICC-01/04, paras. 50, 51.

[238] See **Goldstein**, **A.** (1982). "Defining the Role of the Victim in Criminal Prosecution." Mississippi Law Journal **52**: 515-560. At page 555; see also **Mekjian**, **G. J.** and **M. C. Varughese** (2005). "Hearing the victim's voice: analysis of victims' advocate participation in the trial proceeding of the International Criminal Court." Pace International Law Review **17**: 1-46. At page 33.

[239] **Mekjian**, **G. J.** and **M. C. Varughese** (2005). "Hearing the victim's voice: analysis of victims' advocate participation in the trial proceeding of the International Criminal Court." Pace International Law Review **17**: 1-46. At page 33.

[240] See e.g. **Donat-Cattin**, **D.** (1999). Art. 68 "Protection of victims and witnesses and their participation in the proceedings". Commentary on the Rome Statute of the International Criminal Court.

of proceedings, by ensuring a view other than the Prosecutor's is presented to the Chamber.[241]

Of course it could be argued that the actions of the Prosecutor should be subject to the purposes of punishment as described above and should therefore also factor in restorative values such as reconciliation. However, it is of course conceivable that the Prosecutor will aim mainly to procure a conviction and that victims therefore need a "voice" in the sense of being able to ensure that certain aspects will be taken into account in the proceedings.

It seems that the ICC favours a similar interpretation as one Chamber has said that in its opinion, the Statute granted victims an independent voice and role in proceedings before the Court and that it should be possible to exercise this independence, in particular, vis-à-vis the Prosecutor of the International Criminal Court so that victims can present their interests.[242] The Chamber also referred to the jurisprudence to the European Court of Human Rights which on several occasions has confirmed, that victim participation in criminal proceedings could not be regarded as "either the opponent – or for that matter necessarily the ally – of the prosecution, their roles and objectives being clearly different".[243]

Similarly in the victim information booklet it is said that by presenting their own views and concerns to the judges, victims are given a voice in the proceedings that is independent of the Prosecutor. This would help the judges to obtain a clear picture of what happened to them or how they suffered, which they might decide to take into

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Observers´Notes Article by Article. O. Triffterer. Baden-Baden, Nomos Verlagsgesellschaft. At page 885.; **Heikkilä**, **M.** (2004). International criminal tribunals and victims of crimes. Turku, Institute for Human Rights, Abo Akademi University. At page 142.

[241] **Stahn**, **C.**, **H. Olasolo**, et al. (2006). "Participation of Victims in Pre-Trial Proceedings of the ICC." Journal of International Criminal Justice **4**(1): 219-238. At page 226.

[242] See PTC I, **Situation in the Democratic Republic of the Congo**, Decision on the applications for participation in the proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6 of 17 January 2006, Case No. ICC-01/04, para. 51.

[243] See **Berger vs. France**, Judgement of 3 December 2002, Application No. 48221/99, para. 38; **Perez vs. France**, Judgment of 12 February 2004, Application No. 47287/99, para. 68.

account at certain stages in the proceedings thus eventually leading to an impact on the way proceedings were conducted and in the outcomes.[244]

Finally, as seen above, such a "control function" is also being accepted as purpose of victims participation in national systems.

Others argue that in "giving a voice to victims" criminal courts, which are generally open to the public and reported in the media, should allow victims of crimes under international law the opportunity to tell their stories and for that story to enter in the transcript of the trial and, hence, into the legal and historical record. It is said that by virtue of its status as an internationally recognised judicial institution, an international criminal court is an authoritative finder of both fact and law and can thus establish a historical record which, while not beyond dispute, is widely accepted.[245] It has also been said that a criminal trial could be a congenial public opportunity for collective mourning of the victims. It provided a ritual that was helpful for family members and a sympathetic public in coming to terms with melancholia in even the most traumatic cases.[246]

As against this, it has been noted that personal interests will only be recognised before the ICC insofar as they relate to a Court function and that therefore the Court is unlikely to be interested in hearing a story for its own sake.[247]

The author agrees with the latter evaluation of the role of victim participation at the ICC. As personal interests will only be considered in greater context before the ICC[248], it must

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[244] See Victim booklet at page 12.

[245] **McDonald**, **A.** (2002). The Role of Victims and Witnesses in International Criminal Trials. Treaty Enforcement and International Cooperation in Criminal Matters with special reference to the Chemical Weapons Convention. R. Yepes-Enriques and L. Tabassi. The Hague, T.M.C. Asser Press**:** 257-276. At page 259.

[246] See **Osiel**, **M.** (1997). Mass atrocity, collective memory, and the law. New Brunswick, New Jersey, Transaction Publishers. At page 67.

[247] **Haslam**, **E.** (2004). Victim Participation at the International Criminal Court: A Triumph of Hope over Experience? The Permanent International Criminal Court. Legal and Policy Issues. D. McGoldrick, P. Rowe and E. Donnelly. Oxford and Portland Oregon, Hart Publishing**:** 315-334. At page 326.

[248] See above page 40 et seq.

be assumed that "story telling" could very well be one means to achieve reconciliation, truth finding or other purposes. However, experiences before the ICTY demonstrate that there is not much time to let victims speak freely and attempts to do so there led to unsatisfactory and much-criticised results.[249]

The ICC will thus most probably not aim to give victims such a "voice" directly and will not, as Haslam says, be interested in hearing a story for its own sake, nor will it promise to hear every story.

Consequently "giving a voice to victims" before the ICC can only be understood in the sense of giving victims the legal opportunity to be a watchdog over the fairness of the proceedings with respect to their own interests. It can be assumed that such a purpose indeed is intended, also because the ICC itself already alluded to this fact.

3. Retribution

One of the underlying purposes of victim participation could also be to give victims the opportunity to satisfy any potential desires for retribution.

It has been said that one of the main goals for the participation of victims in the trial is to seek a conviction. [250] Whether this is really the case remains to be seen. But if retribution is and remains one of the main purposes of punishment, it may be assumed that victim participation is also aimed at satisfying any possible desire for retribution. This would not, of course, signify that the victim will have a direct impact on sentencing, being an "objective" matter on which personal opinions will have no bearing. The legal expression of retribution in the form of the sentence will remain in the hands of the Court and the Prosecution while the victim will only have the possibility to state his or her opinions.[251]

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[249] See above page 19.

[250] **Zappalà**, **S.** (2003). Human Rights in International Criminal Proceedings. Oxford, Oxford University Press. At page 225.

[251] See thereto below pages 205 et seq..

Retribution and vengeance are not to be confused even if they may share a common structure. Retribution is impersonal, personal vengeance has no place in the courtroom.[252]

However, it should not be forgotten that retribution has already been criticized as a punishment purpose and can arguably be seen as a hindrance to reconciliation.[253] It is probably not without reason that retribution is not mentioned in national contexts as a purpose of victim participation and is rather left completely to the authorities.

It may therefore be the case that the ICC does not rate retribution as a purpose of participation, at least it seems inadvisable that the ICC will put this purpose to the foreground.

4. Norm stabilization/restoration of the rule of law

Norm stabilization or the restoration of the rule of law has been singled out as one of the purposes that could become more important in international criminal law than other purposes.[254] Victim participation is considered one of the essential tools for bringing the Court and its proceedings closer to the persons who have suffered atrocities.[255] Victim participation has also been seen as a means of improving the public's identification with the plight of victims, to help tame or channel the anger and frustration felt by victims and others who no longer trust in the states' willingness or ability to combat crime.[256] With such effects victim participation could ultimatively also contribute considerably to the establishment of the Court's acceptance and authority. Of course it is impossible to

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[252] See Hassemer, W. and J. P. Reemtsma (2002). Verbrechensopfer. Gesetz und Gerechtigkeit. München, C.H. Beck. Pp 123 et seq; see also **Crocker**, **D. A.** (1999). Retribution and Reconciliation. Maryland, Institute for Philosophy and Public Policy.

[253] See above pages 30 et seq..

[254] See above pages 34 et seq.

[255] See **Bitti**, **G.** and **H. Friman** (2001). Participation of Victims in the Proceedings. The International Criminal Court, Elements of Crimes and Rules of Procedure and Evidence. R. S. Lee. Ardsley, New York, Transnational Publishers**:** 456-474. At page 467.

[256] **Aldana-Pindell**, **R.** (2004). "An Emerging Universality of the Justiciable Victims' Rights to the Criminal Process to Curtail Impunity for State-Sponsored Crimes." Human Rights Quarterly **26**: 605-686. At page 613.

guarantee such an effect in advance and whether victim participation has such an effect will, to a great degree, depend on the general acceptance of the ICC, but still it seems possible that one idea behind victim participation is to assist the process of norm stabilization.

5. Reconciliation

There are indications that collective reconciliation will be made part of the punishment purposes of the ICC, even if the ICC cannot achieve reconciliation on its own but can only promote it.[257]

Accordingly, one aim of victim participation could be to promote reconciliation.

Indeed, during the negotiations of the Rome Statute, delegations stressed the contribution of victims' participation to the process of reconciliation. Through victim participation the offender should be made more aware that he or she has not only committed a serious breach of public norms, but that he or she has also inflicted harm and suffering on another human being.[258] Others also see victim participation as a necessary component in successfully promoting a reconciliation process.[259]

But what are the means with which reconciliation may be promoted ? The ICC will have to decide whether reconciliation between individual victims and the perpetrator, story-telling by victims and acknowledgment of their suffering serve this purpose better than formalized proceedings where victims can influence the process mainly legally through their representative. The underlying question is, again, whether focusing on specific interests such as personal reconciliation or healing can serve a general symbolic purpose,

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[257] Compare above pages 35 et seq.

[258] See **Timm**, **B.** (2001). The Legal Position of Victims in the Rule of Procedure and Evidence. International and National Prosecution of Crimes under International Law. H. Fischer, C. Kreß and S. R. Lüder. Berlin, Berlin Verlag**:** 289-307. At page 293; see also **van Boven**, **T.** (1999). The Position of the Victims in the Statute of the International Criminal Court. Reflections on the International Criminal Court, Essays in Honour of Adrian Boos. H. von Hebel, J. G. Lammers and J. Schukking. The Hague, TMS Asser Press**:** 77-89. At pages 75, 88.

[259] See e.g. **Stehle**, **S.** (2006). Das Strafverfahren als immaterielle Wiedergutmachung. Frankfurt am Main. At page 40.

or whether the focus on individual victims rather makes other victims feel excluded from the process. A different possibility would be to let as many victims participate as possible which would probably lead to a much more formalized procedure without much space for individual interests lying outside the strictly legal context. It seems that from the structure of criminal proceedings and the need to take into account the rights of the accused, maybe the latter solution will be easier to realise. Still, the Court will have the liberty to choose some of the aforementioned means if it wishes to do so.

In conclusion we may say that collective reconciliation is one of the purposes aimed at by victim participation.

6. Truth

As mentioned above, it will not be possible for the ICC to avoid contributing to the shaping of history even if its truth-finding function is confined to a "legal truth" and to the facts pertaining to specific accused persons.

It may be assumed that victim participation contributes greatly to this process and that it is designed to do so. It has indeed been argued that victim participation is essential if the truth is to be discovered and punishment is to be just. Information on the impact of the offence on the victim provided by victims themselves could for example help in assessing the seriousness of the offence.[260]

But do victims contribute in a different way or more to the finding of truth in their capacity as victims than witnesses? [261]

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[260] See e.g. **Heikkilä**, **M.** (2004). International criminal tribunals and victims of crimes. Turku, Institute for Human Rights, Abo Akademi University. At page 142; **Donat-Cattin**, **D.** (1999). Art. 68 "Protection of victims and witnesses and their participation in the proceedings". Commentary on the Rome Statute of the International Criminal Court. Observers´Notes Article by Article. O. Triffterer. Baden-Baden, Nomos Verlagsgesellschaft. At page 873.

[261] Critical as to this question **Haslam**, **E.** (2004). Victim Participation at the International Criminal Court: A Triumph of Hope over Experience? The Permanent International Criminal Court. Legal and Policy Issues. D. McGoldrick, P. Rowe and E. Donnelly. Oxford and Portland Oregon, Hart Publishing**:** 315-334. At page 327 who states that the problem is that many of the reasons that have been advanced in support of victim participation reasonate with the justifications put forward for victim-witness testimony. These include the need to establish the truth, to provide an opportunity for individuals and their societies to begin a process of healing and reconciliation.

It is conceivable in theory that victims could contribute more than witnesses or also than victim-witnesses. Victims may add important details if given time to speak freely[262] and because they are not under the pressure of cross-examination and the duty to come and testify. Victims can also - if allowed - report facts that do not necessarily contribute directly to conviction. Finally, victims can tell the Court and hence the world of their personal suffering.

However, this begs the question of how much these additional facts will actually contribute to the processes of truth-finding or history-shaping.

First, the facts that do not pertain strictly to the conviction, will not form part of the verdict as there is an overriding duty to adhere to the legal process in criminal proceedings. At most, those facts could be reported by the media if submitted during public proceedings. However, these types of unproven statements will hardly be recognised to the same extent as facts that have been proven to the criminal standard of proof. Moreover, media reports could even harm the ICC or the victims, if such statements are portrayed in a biased way or by exploiting victims' fates.

With regard to facts asserted by the victim that are relevant to the charges in question, it is important to note that the victim's statement alone is not to be seen as evidence. Evidence has to be presented by a party of the proceedings[263] or ordered by the Court. Victim participation differs from testifying as a witness therein that the victim will not be questioned by the parties or even being made subject to cross-examination. Victim participation is voluntary whereas witnesses are being called by the defence, the prosecution or the Chamber. Victim participation further serves to communicate the own interests of victims while witnesses have to serve the interests of the Court and the Party that calls them.[264] Accordingly, however, a statement made by a victim while

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[262] Which will not necessarily be the case, see below pages 171 et seq .

[263] Compare **Cassese**, **A.** (2003). International Criminal Law. Oxford, Oxford University Press. At page 421.

[264] For more differences see Victim booklet at page 13.

participating may not have evidentiary standard. Such a statement will probably not be admissible for this would infringe upon the rights of the accused.[265]

A victims' statement may rather be effective in a different way. Thereto it has been said that on a moral level, the participation of victims will ensure that the Court, and the international community at large, are made fully aware of the suffering endured by victims.[266]

Of course a victim's statement may be legally effective in the sentencing procedure. According to Rule 145 in its determination of the sentence, the Court shall give consideration *inter alia* to the extent of the damage caused, in particular the harm caused to the victims and their families. Still, those factors are not part of the hearing of evidence and therefore only enter into the truth finding marginally. In the sentencing phase the guilt of the accused is no longer an issue.

The victim statement can thus only contribute to the discovery of the legal truth in a particular case if more evidence is heard on the topic as a result of the victim statement . This could be done in a number of ways. First, the victim him- or herself could submit evidence. However, there is no legal basis for such a right of victims. [267] Second, the Chamber could ask for further evidence following the victim's statement. According to Art. 64(6)(b), (d) and Art. 69(3) the Chamber may indeed order the production of evidence in addition to that already collected prior to the trial or presented during the trial by the parties. The victim statement may therefore induce the production of further evidence.

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[265] As for the admissibility of evidence see Art. 69(4).

[266] See **Stahn**, **C.**, **H. Olasolo**, et al. (2006). "Participation of Victims in Pre-Trial Proceedings of the ICC." Journal of International Criminal Justice **4**(1): 219-238. At page 221.

[267] See thereto pages 171 et seq.

Finally it should not be forgotten that the Chamber is under an obligation to pursue the proceedings expeditiously.[268] This would appear to limit the number of statements and the maybe following ordering of the production of further evidence.

In conclusion it can be said that victims do indeed impact on the finding of truth. However, as shown above, as long as victims do not testify as witnesses at the same time, their impact is rather limited and should not be overestimated. Still, contributing to the truth can be seen as one of the aims of victim participation even if its impact is limited.

7. Rehabilitation of the victim

Another goal of victim participation could be the "rehabilitation" of the victim. This can be understood in the sense of an individual healing or regaining his or her dignity for instance through the Court's acknowledgment of the victim's suffering.[269] It is said that for survivors of torture and organised violence, receiving some form of acknowledgement of what they have endured is particularly important therapeutically. Acknowledgement is said to generally aid the healing process and can be the key to achieving a sense of closure.[270] Victim participation is therefore arguably essential if one wants to avoid secondary victimization and victim alienation.[271]

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[268] See Arts. 64(2) and 64(3), Rules 84, 91, 101 and 131 in accordance with whch the trial must be fair and expeditious.

[269] See **Donat-Cattin**, **D.** (2001). The Rights of Victims and International Criminal Justice. International Lawyers as we enter the 21st Century, International Focus Programme 1997-99. E. International. Berlin, Berlin Verlag, **Jorda**, **C.** and **J. de Hemptienne** (2002). The Status and Role of the Victim. The Rome Statute of the International Criminal Court, A Commentary. A. Cassese, P. Gaeta and J. R. W. D. Jones. Oxford, Oxford University Press. **2:** 1387-1419. At Page 194; **Möller**, **C.** (2003). Völkerstrafrecht und Internationaler Strafgerichtshof - kriminologische, straftheoretische und rechtspolitische Aspekte. Münster, LIT Verlag. At page 606; see also **Bedont**, **B.** (1999). Gender-Specific Provisions in the Statute of the International Criminal Court. Essays on the Rome Statute of the International Criminal Court. F. Lattanzi and W. A. Schabas. Ripa di Fagnano Alto, Sirente. **1:** 201 et seq. At page 204.

[270] Redress, Legal Remedies for Victims of "International Crimes" (2004). At Page 2. Werle, G. (2005). Principles of International Criminal Law. The Hague, TMC Asser Press. At Page 31; see also Heikkilä, M. (2004). International criminal tribunals and victims of crimes. Turku, Institute for Human Rights, Abo Akademi University. At page 68.

[271] **Heikkilä**, **M.** (2004). International criminal tribunals and victims of crimes. Turku, Institute for Human Rights, Abo Akademi University. At page 142.

The participation process is said to have a healing effect because victims can feel part of the process that directly affects their interests. Their trauma is reinforced through feelings of helplessness and isolation by what they can perceive as a "conspiracy of silence" between society and survivors. This is manifested in the collective refusal to acknowledge the wrong. Through the process and victims' participation within it the silence can be broken which can play a vital role in the victims' recovery. Furthermore, the ability to participate actively in the proceedings, as provided for in the Court's procedures, may assist victims to take back control of their lives and to ensure that their voices are heard, respected, and understood. [272]

Participatory rights are said to bolster the dignity of victims by giving them a voice in proceedings, giving them a feeling of self-determination. The debasement and dehumanisation that the perpetrator has inflicted on the victims is thus symbolically reversed.[273] Participation has even been termed to be non-material reparations. [274]

However, it has also been pointed out that the curative effect of participation may be limited if victims are encouraged to adopt the language and structure of legal narrative. This potential problem might be compounded by the fact that victims are entitled to appoint a lawyer. The appointment of a legal representative is aimed to protect victims' rights. However, the translation of victim's story into a legal form may do little to provide a victim with therapeutic relief, especially if victims cannot tell their stories at all. This difficulty is compounded in the case of crimes of a collective nature, where a victim's individual interests might be represented collectively with the result that his or her

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[272] **Danieli**, **Y.** (2004). "Victims: Essential Voices at the Court." Bulletin of the victims right working group **1**: 6.

[273] **Möller**, **C.** (2003). Völkerstrafrecht und Internationaler Strafgerichtshof - kriminologische, straftheoretische und rechtspolitische Aspekte. Münster, LIT Verlag. See pp. 535 et seq, page 605.

[274] See **Stehle**, **S.** (2006). Das Strafverfahren als immaterielle Wiedergutmachung. Frankfurt am Main. At pages 45, 331; **Scomparin**, **L.** (2005). Il ruolo della vittima nella giurisdizione penale internazionale: alla ricerca di una possibile mediazione fra modelli processuali. Problemi Attuali Della Giustizia Penale Internazionale. A. Cassese, M. Chiavario and G. De Francesco. Torino, Giappichelli Editore**:** 365-398. At page 368.

individual truth and pain might be hidden.[275] It has also been argued that legal proceedings do not offer therapeutic healing at all.[276]

Coping with trauma, regaining one's dignity and healing all are very personal processes. The author submits that it is not possible to predict whether the participation process can have the effects foreseen by some. However, victim participation is at least a possibility for victims which they may choose to use or not. In contrast to "participation" as witnesses, victim participation is voluntary and does not involve as many difficulties for the victim as being a witness.

As to the question of whether victim participation is aimed at rehabilitating victims, it has been already shown above[277] that personal rehabilitation will not be a direct aim of participation but rather a means of contributing to collective reconciliation. [278] Of course, any positive effects for individuals that are achieved by participation will be a very welcome side effect and participation before the ICC will hopefully not be seen to involve retraumatizing victims. However, the ICC will not aim directly to rehabilitate all individual victims. Indeed, the ICC will probably not have the means to achieve this anyway and is already restricted by the need to conduct its proceedings expeditiously. As the experiences of the ICTs have shown, Courts are also not designed and judges not trained to heal the trauma of victims.

It seems then that reparations are more suitable to achieving the rehabilitation of victims.[279]

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[275] **Haslam**, **E.** (2004). Victim Participation at the International Criminal Court: A Triumph of Hope over Experience? The Permanent International Criminal Court. Legal and Policy Issues. D. McGoldrick, P. Rowe and E. Donnelly. Oxford and Portland Oregon, Hart Publishing**:** 315-334. At page 331.

[276] **Dembour**, **M.-B.** and **E. Haslam** (2004). "Silence Hearings? Victim-Witnesses at War Crimes Trials." European Journal of International Law **15**(1): 151-177. At page 160.

[277] See above pages 33 et seq.

[278] See similarly **Jorda**, **C.** and **J. de Hemptienne** (2002). The Status and Role of the Victim. The Rome Statute of the International Criminal Court, A Commentary. A. Cassese, P. Gaeta and J. R. W. D. Jones. Oxford, Oxford University Press. **2:** 1387-1419. At page 1401.

[279] See Art. 75(1) and Rule 94(1) that mentions that claims for restitution, compensation, rehabilitation and "other remedy" can be made; on the aims of reparations see also **Dwertmann, Eva,** The Reparations

8. Confrontation

Confronting the perpetrator with the suffering of the victims could be another purpose of victim participation. It is important that the perpetrator is also made aware of facts that are beyond the objective elements of crime he or she committed but which have a significant impact on the victim, such as emotions, or injuries with sometimes lifelong after-effects.

However, it seems that just as with the "rehabilitation of the victim", confrontation could be an important factor in achieving reconciliation or other goals and will therefore probably take place. However, it should not be seen as an explicit aim of victim participation, as it is indeed conceivable that the perpetrator will not necessarily be confronted with individuals but rather with their legal representative.

9. Link to reparation

Another reason for letting victims participate in the proceedings could be to establish a link between victim participation and reparations. It seems that the drafters of the Statute believed that the participation of victims within the criminal proceedings could achieve the necessary link to victims' reparations, while reparations appear to be for them appears the most important restorative element in the Statute.[280] Others also emphasize the importance of such a link.[281]

System of the International Criminal Court, its implementiation, possibilities and limitations, forthcoming.

[280] One generally accepted reason for allowing questioning by the legal representative was that certain evidence important also for a later determination of reparations could be obtained already in the criminal proceedings. This would avoid repeated appearances of witness before the Court: See **Lee**, **R. S.** (2001). The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence. Ardsley, New York, Transnational Publishers. At page 467; see also **Mekjian**, **G. J.** and **M. C. Varughese** (2005). "Hearing the victim's voice: analysis of victims' advocate participation in the trial proceeding of the International Criminal Court." Pace International Law Review **17**: 1-46. At page 29.

[281] See **Timm**, **B.** (2001). The Legal Position of Victims in the Rule of Procedure and Evidence. International and National Prosecution of Crimes under International Law. H. Fischer, C. Kreß and S. R. Lüder. Berlin, Berlin Verlag**:** 289-307. At page 293; **van Boven**, **T.** (1999). The Position of the Victims in the Statute of the International Criminal Court. Reflections on the International Criminal Court,

Participation is not necessarily a precondition to receiving reparations later on. According to Art. 75(1) and Rule 95 in exceptional circumstances the Court may, on its own motion, determine the scope and extent of any damage, loss and injury to, or in respect of victims.[282]

It may also be that there are victims who do not want to participate in the proceedings but prefer to apply for reparations only. This is possible according to Rule 94.

However, a reparation order against a person still requires the prior conviction of that person. As a victim may take part in that conviction by participating in the proceedings there is thus a link between participation and reparations. Moreover, it will be determined in the proceedings if the participant really is a victim which naturally has an impact on the question of reparations. The perpetrator may also be confronted with the personal suffering of the victims, eventually preparing the ground for a subsequent apology. In the reparation proceedings, there is yet another chance to restore the victim's dignity and to have the harm suffered acknowledged.[283]

In sum, the link of victim participation to the reparation-function of proceedings must be classified as one of the more important aims of victim participation.

10. Conclusion

After having researched the aims of victim participation on the basis of the existing purposes of punishment it may be said that one of the most prominent aims of victims participation is giving a voice to victims in the sense of giving them a legal control function. Another important function of victim participation is to contribute to norm stabilization and reconciliation and to a certain extent also to truth-finding,. However, it is submitted that the latter function is frequently overestimated because no differentiation is

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Essays in Honour of Adrian Boos. H. von Hebel, J. G. Lammers and J. Schukking. The Hague, TMS Asser Press**:** 77-89. At pages 75, 88.

[282] See **Dwertmann, Eva,** The Reparations System of the International Criminal Court, its implementiation, possibilities and limitations, forthcoming.

[283] **Ferstman, Carla:** The Reparation Regime of the International Criminal Court: Practical Considerations, Leiden Journal of International Law (2002). At pages 667, 668.

made between victims testifying as witnesses and victim participation. Ultimately, another important aim of victim participation is to create a link to the reparation proceedings, reparations being a very important factor in restorative justice.

III. Victims' wishes and needs

The following section will assess whether the participatory role given to victims is satisfactory from their perspective by discussing the needs and wishes of victims.[284] It is frequently assumed that victims-witnesses benefit from participating in war crime proceedings,[285] an assumption which will be scrutinised below.

To begin, it is important to clarify that it is not correct to speak of "the needs of victims". Naturally every victim will define his or her needs differently, due to the individuality of needs and as each is the victim of a different crime. Thus, when exploring the issue of victim needs it should not be forgotten that some needs may be common to several persons but that it can never be said that they are common to all victims.[286]

At the outset, we must consider the possibility that victims could reject the ICC as an institution and thereby also reject participation in its proceedings. It seems that some victims would prefer other models of justice to criminal trial and punishment. In Uganda, the *New York Times* has reported that some victims oppose ICC involvement. The reasons offered include victims' fears that prosecutions will prolong the bloodshed, as well as the sense that foreign models of retributive justice will not bring reconciliation to their

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[284] Some references to victimological research will thus be made although these have to be handled with care as victimological theory is not always well-defined, see thereto **van Dijk**, **J.** (1986). The victims' movement in Europe, introducing report 16th Criminological Research Conference, Research on Victimisation. See also **van Dijk**, **J.** (1988). Victim rights: a right to better services or a right to active participation? Criminal law in action. J. van Dijk, C. Haffmans, F. Rüter, J. Schutte and S. Stolwijk. Deventer, Kluwer law and taxation publishers**:** 351-371. At page 351.

[285] And as Haslam/Dembour say though for the participation of "victim-witnesses" rarely really examined, see **Dembour**, **M.-B.** and **E. Haslam** (2004). "Silence Hearings? Victim-Witnesses at War Crimes Trials." European Journal of International Law **15**(1): 151-177. At page 152.

[286] Similarly see **Schotmans**, **M.** (2005). Victims' expectations, needs and perspectives after gross and systematic human right violations. Out of the Ashes. K. De Feyter, S. Parmentier, M. Bossuyt and P. Lemmens. Antwerpen, Intersentia**:** 105-134. at page 105; see also **UNODCCP** (1999). Handbook on Justice for Victims, on the Use and Application of the Declaration of Basic Pronciples of Justice for Victims of Crime and Abuse of Power. New York, Center for International Crime Prevention. At page 6.

communities as well as local processes could if left to their own devices. [287] Naturally, this report is rather anecdotal and does not provide an empirical basis for a claim that many victims support this view. However, it may be that such a view does exist.

With regard to victims' needs within an international criminal justice system, on the one hand it is frequently said that victims want a conviction above all other things[288] and that they are advocates of retribution.[289] This is criticized by representatives of the restorative approach who contend that victims in fact need healing and forgiveness.[290]

Indeed the supposed interest of victims in retribution has been repeatedly politically abused[291], for example used as support for more reactionary approaches.[292] However, it seems that the opposite argument that victims want reconciliation rather than retribution is also unsubstantiated.

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[287] See http://www.darfurpeaceanddevelopment.org/article.php?ID=163&Section=newsarchive.

[288] **Zappalà**, **S.** (2003). Human Rights in International Criminal Proceedings. Oxford, Oxford University Press. At page 225; see also **Aldana-Pindell**, **R.** (2004). "An Emerging Universality of the Justiciable Victims' Rights to the Criminal Process to Curtail Impunity for State-Sponsored Crimes." Human Rights Quarterly **26**: 605-686. At page 608.

[289] **Gallon**, **G.** (2000). Deterrence: A difficult challenge for the International Criminal Court. At page 4; **Gehrken**, **J.** (2000). "Billig und gerecht? Verfahren zwischen Rechtsstaatlichkeit und Effizienz." Forum Recht **3**.;**Möller**, **C.** (2003). Völkerstrafrecht und Internationaler Strafgerichtshof - kriminologische, straftheoretische und rechtspolitische Aspekte. Münster, LIT Verlag. At page 538.

[290] See for example **Eisnaugle**, **C. J. N.** (2003). "An International Truth Commissions: *Utilizing Restorative Justice as an Alternative to Retribution*." Vanderbilt Journal of Transnational Law **36**(1): 209-242. page 236; **Möller**, **C.** (2003). Völkerstrafrecht und Internationaler Strafgerichtshof - kriminologische, straftheoretische und rechtspolitische Aspekte. Münster, LIT Verlag. Pp 231 et seq.

[291] See **Hörnle**, **T.** (2006). "Die Rolle des Opfers in der Straftheorie und im materiellen Strafrecht." Juristische Zeitung **19**: 950-958. At page 952; see also H**assemer, W**. and **J**. **P**. **Reemtsma** (2002). Verbrechensopfer

Gesetz und Gerechtigkeit. München, C.H. Beck. Pp 13 et seq; see also **Walklate**, **S.** (1989). Victimology The Victim and the Criminal Justice Process. London, Unwin Hyman. At page 130.

[292] **Kilchling**, **M.** (1995). Opferinteressen und Strafverfolgung. Freiburg im Breisgau, Edition iuscrim. At page 649; see also **Kilchling**, **M.** (2002). "Opferschutz und der Strafanspruch des Staates - Ein Widerspruch?" Neue Zeitschrift für Strafrecht **22**(2): 75-112. At page 85.

There is a lack of empirical research and theory[293] on the topic of victims expectations and needs in international criminal law. There is little research available on the topic of how victims have found the experience of testifying before the ICTs as witnesses[294] and there is no documentation regarding how victims perceive their participation in international law settings yet.

At this point, the options open to me in this research were also limited. I have neither had the time nor the necessary knowledge, for instance of how to handle trauma, to interview a representative number of victims. Furthermore, there are not yet any victims in the international law context who have already participated other then as witnesses throughout a whole trial process[295] who I could have interviewed. However, this is no reason not to open a debate on the topic. There is at least some material which may be used and there are some conclusions to be drawn from the academic debate.

The following will give a short overview on the few voices found in literature and jurisprudence concerning crimes under international law.

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[293] In this regard an argument made by van Dijk although maybe not completely up-to-date anymore is still meaningful: "Although I take pride in my association with the victims movement, I have reservations about the notion of "applied vicimology". Clearly, the movement's demands and achievements do not flow from a well-defined victimological theory, or in fact from any social theory at all. For this reason, I prefer to call the carious trends within the victim movement "victimagogic" ideologies: that is, ideologies about the best ways to give treatment, guidance or support to crime victims. At some distant point in the future, these victimagogic ideologies may develop into a unified victimagogic theory grounded in victimological research." See **van Dijk**, **J.** (1986). The victims' movement in Europe, introducing report 16th Criminological Research Conference, Research on Victimisation. See also **van Dijk**, **J.** (1988). Victim rights: a right to better services or a right to active participation? Criminal law in action. J. van Dijk, C. Haffmans, F. Rüter, J. Schutte and S. Stolwijk. Deventer, Kluwer law and taxation publishers**:** 351-371. At page 351.

[294] See **Stover**, **E.** (2005). The Witnesses War Crimes and the Promise of Justice in The Hague. Philadelphia, University of Pennsylvania Press. At page 17 who states that "little, if anything is known about the experiences of victims and witnesses who have testified before international war crimes tribunals. What we do know is anecdotal, based largely on accounts given to the press by past witnesses. A review of English literature covering the hundreds of war crimes trials held after World War II reveals not a single empirical study of witnesses and their perceptions of the trial process." Further, concerning this matter the Women's Caucus has identified, that there is: "a wide gap in the information available concerning the ways in which victims have experienced their participation in justice processes of the ad hoc tribunals." First hand information about the ways in which victims have specifically encountered the processes and procedures of the ad hoc tribunals has been slow in surfacing; see. Victims and Witnesses in the ICC Report of Panel Discussions on Appropriate Measures for Victim Participation and Proctection in the ICC" see www.iccwomen.org/resources/vwicc/index.htm.

[295] The first Trial before the ICC has started on January 26, 2009.

During the *Papon* trial one lawyer contended that the simple fact of holding the trial had an "assuaging" value for the civil parties. And one survivor testified in court, "We have been survivors, we hope to become living people" – voicing the hope that submission and publication would eventually lead to the victims achieving a selfhood released from the singular identity of the survivor.[296]

It has also been said that it is also very important for victims to be recognized as a subject to the proceedings with certain rights such as a right to information, to inspect the records, to be present at the proceedings, to make statements[297], to have the possibility to control the proceedings[298] and to have a right to be kept informed of developments without having to apply such privileges as a sign of official acknowledgement or interest in the fate of victims.[299]

Beyond this, surviving victims have also sought independent prosecutorial powers to press charges or participate at trial by introducing evidence or cross-examining witnesses.[300]

There are different opinions on what victims wish to achieve by participating in such a process. On the one hand, retribution is often seen as the primary goal[301] on the other hand there is said to be a desire for healing and forgiveness.[302]

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[296] See **Wood**, **N.** (2000). The Papon Trial in an "Era of Testimony". The Papon Affair: Memory and Justice on Trial. R. J. Golsan. London, Routledge**:** 96-114.At page 100.

[297] See **Joutsen**, **M.** (1987). The Role of the Victim of Crime in European Criminal System: A crossnational study of the role of the victim. Helsinki, Heuni. At page 181.; **Kilchling**, **M.** (1995). Opferinteressen und Strafverfolgung. Freiburg im Breisgau, Edition iuscrim. At pages 296, 650; see also **Strang**, **H.** (2002). Repair or Revenge. Victims and Restorative Justice. Oxford, Clarendon Press. Pp. 8 et seq; **Wemmers**, **J.-A.** (1996). Victims in the criminal justice system. Amsterdam, New York, Kugler Publications. Pp 18, 19.

[298] **Rauschenbach, M., D. Scalia** (2008). „Victims and international criminal justice: a vexed question?" International Review of the Red Cross **90** (870): 441-459. At page 446.

[299] **Shapland**, **J.**, **J. Willmore**, et al. (1985). Victims in the Criminal Justice System. Aldershot, Gower Publishing Company Limited. At pages 85-87; **Tampe**, **E.** (1992). Verbrechensopfer. Stuttgart, München, Hannover, Berlin, Weimar, Richard Boorberg Verlag GmbH & Co. Pp 97 et seq.

[300] See, e.g. Interamerican Court for Human Rights., Third Report on the Situation of Human Rights in Paraguay, OEA/ser. L./V./II.110, doc. 52, Ch. IV (2001), at 11 (explaining that the amended 1992 Paraguayan Constitution allowed victims to present questions about the indictment or make requests to the courts other than those made by the Public Ministry).

Stover describes experiences at the ICTY, that there most of the witnesses expressed no desire to seek revenge. Some, especially those who had been raped or tortured had harboured such fantasies after their release from captivity, but these had soon dissipated.[303] Instead, many victims expressed the need that the truth shall be revealed[304] and that society officially condemned the criminal act. Victims did not clamour for more severe punishment but rather wanted the perpetrator to be held accountable officially.

Similarly Wendy Lobwein, Support Officer of the Victim and Witness Unit of the ICTY, inferred from the many anecdotes of hundreds of witnesses, that victims and witnesses essentially came to testify for four reasons: to speak for the dead, to look for justice in the present and to help the truth be known by the world, in the hope that such crimes could be prevented in the future.[305]

Rohde describes in his book about the events in Srebrenica that the people from Srebrenica whom he had talked to wanted the leaders punished but had mostly no desire that all Serbs be punished. On the contrary, many expressed the desire to live together with the Serbs in peace as they did before the war.[306]

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[301] **Gallon**, **G.** (2000). Deterrence: A difficult challenge for the International Criminal Court. At page 4; **Gehrken**, **J.** (2000). "Billig und gerecht? Verfahren zwischen Rechtsstaatlichkeit und Effizienz." Forum Recht **3**.; see **Möller**, **C.** (2003). Völkerstrafrecht und Internationaler Strafgerichtshof - kriminologische, straftheoretische und rechtspolitische Aspekte. Münster, LIT Verlag. At page 538.

[302] See for example **Eisnaugle**, **C. J. N.** (2003). "An International Truth Commissions: *Utilizing Restorative Justice as an Alternative to Retribution*." Vanderbilt Journal of Transnational Law **36**(1): 209-242. At page 236; **Möller**, **C.** (2003). Völkerstrafrecht und Internationaler Strafgerichtshof - kriminologische, straftheoretische und rechtspolitische Aspekte. Münster, LIT Verlag. At page 454.

[303] See **Stover**, **E.** (2005). The Witnesses War Crimes and the Promise of Justice in The Hague. Philadelphia, University of Pennsylvania Press. At page 76.

[304] Similarly Ibid. At page 110.

[305] See **Rohne, H.C.** (2005). The Victims and Witnesses Section at the ICTY. An Interview with Wendy Lobwein, Max Planck Institut für ausländisches und internationales Strafrecht, at page 3.

[306] See **Rohde**, **D.** (1997). Die letzten Tage von Srebrenica: was geschah und wie es möglich wurde. Reinbek bei Hamburg, Rowohlt Taschenbuch Verlag. At page 405.

One experience from Truth Commissions seems to be that it was agreed among victims that the most important thing was to know the truth, not the punishment of offenders.[307] When speaking of truth it should further be kept in mind that victims will often want to understand "truth" in a much wider sense then intended for in criminal justice. Accounts have been given of witnesses before the ICTY often wanting to give historical context to the events they had witnessed, but being restrained from doing so by the judges. Consequently, some felt cheated, and paradoxically so, since it was precisely the prospect of testifying in an international venue that had prompted them to do so in the first place.[308] It seems to be an important aspect for many victims that they are allowed to tell their stories publicly, sometimes going beyond the "legal truth".[309] That the "true story" receives official sanction and the perpetrators along with public and open discussion of the nature of the atrocities and the suffering of the victims[310] seem to be important for some victims in re-establishing their self-respect and sympathy.[311]

The notion that storytelling is healing, is also based on several psychological studies which demonstrate that individuals who repress intense emotional pain can suffer from physical and psychological problems that damage family and other relationships.[312]

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[307] **Eisnaugle**, **C. J. N.** (2003). "An International Truth Commissions: *Utilizing Restorative Justice as an Alternative to Retribution*." Vanderbilt Journal of Transnational Law **36**(1): 209-242. At page 234.

[308] See **Stover**, **E.** (2005). The Witnesses. War Crimes and the Promise of Justice in The Hague. Philadelphia, University of Pennsylvania Press. At page 10; see also **Dembour**, **M.-B.** and **E. Haslam** (2004). "Silence Hearings? Victim-Witnesses at War Crimes Trials." European Journal of International Law **15**(1): 151-177. pp. 151 et seq.

[309] See (1997). Promoting the Right to Reparation for Survivors of Torture: What Role for a Permanent International Criminal Court?, Redress, **Goldstone**, **R.** (1999). Healing wounded People - War Crimes and Truth Commissions. Verletzte Menschen heilen - War Crimes and Truth Commissions. Karlsruhe, C.F. Müller.At pp. 9 et seq; **Redress,** Promoting the Right to Reparation for Survivors of Torture: What Role for a Permanent International Criminal Court (1999). At page 25.

[310] See **Stover**, **E.** (2005). The Witnesses. War Crimes and the Promise of Justice in The Hague. Philadelphia, University of Pennsylvania Press. At page 110.

[311] See **Osiel**, **M.** (1997). Mass atrocity, collective memory, and the law. New Brunswick, New Jersey, Transaction Publishers. At page 273.

[312] See for example, **Agger, I.,** The Blue Romme; Trauma and Testimony among refugee Women: A Psychosocial Exploration (London: Zed Books, 1992); **S. M. Weine, A. D. Kulenovic, I. Pavkovic and R. Geldons**, "Testimony Psychotherapy in Bosnian Refugees: A Pilot Study, " American Journal of Psychiatrie 151 (1998); 1720-25; Patricia K. Robin Herbst, "Grom Helpless Victim to Empowered Survivor; Oral History as a Treatment of survivors of Torture," Refugee Women and Their Mental Health 13 (1992): 141-54; Adrenne Aron, "Testimonio: A Birdge between Psychotherapy and

Storytelling not only entails being listened to, but also getting some form of acknowledgement. Victims seem to have a strong desire to be respected and appreciated during the trial process.[313]

Studies and findings from national law are different with regard to the context and offences which they pertain to and can therefore only be indicative. Furthermore, it is not possible to provide a comprehensive account of national studies here. It is also interesting to note that inquiries in national contexts did not generally raise questions concerning the criminal proceedings and the role of the victim therein, so that conclusions on that issued are also scarce in national contexts.[314]

In studies of national law it has also been found that only a small percentage of victims have a desire for retribution.[315] On the other hand it has also been said that many victims do want the prosecution and conviction of the perpetrator.[316]

A study of Dutch law showed that the opportunity to express one's emotions was valued particularly highly by victims. Many also indicated that they would appreciate an opportunity to make some oral comments in Court.[317]

Sociotherapy," Refugee Women and Their Mental Health 13 (1992); 173-89**; Ana Julia Cienfuegos and Cristina Monelli**, "The Testimony of Political Repression as a Therapeutic Instrument," Amercian Journal of Orthopsychiatry 53 (1983) 43-51; and Federico Allodi, Glenn R. Randall, et al. in Stover and Nightingale eds., The Breaking of Bodies and Minds, 58-78.

[313] See **Stover**, **E.** (2005). The Witnesses. War Crimes and the Promise of Justice in The Hague. Philadelphia, University of Pennsylvania Press. At page 27.

[314] See **Höynck**, **T.** (2005). Das Opfer zwischen Parteirechten und Zeugenpflichten. Baden-Baden, Nomos Verlagsgesellschaft. At page 54. see also **van Dijk**, **J.** (1988). Victim rights: a right to better services or a right to active participation? Criminal law in action. J. van Dijk, C. Haffmans, F. Rüter, J. Schutte and S. Stolwijk. Deventer, Kluwer law and taxation publishers**:** 351-371. At page 351 who notes that little research has been done into the real needs and wishes of victims.

[315] See e.g. **Kilchling**, **M.** (1995). Opferinteressen und Strafverfolgung. Freiburg im Breisgau, Edition iuscrim. At page 628;**Baurmann**, **M.** and **W. Schädler** (1991). Needs and Expectations of Crime Victims. Victims and Criminal Justice. G. Kaiser, H. Kury and H.-J. Albrecht. Freiburg im Breisgau, Eigenverlag Max-Planck-Institut für ausländisches und internationales Strafrecht. **1:** 3-29.At pp 9, 15; see thereto more generally **Rauschenbach, M., D. Scalia** (2008). „Victims and international criminal justice: a vexed question?" International Review of the Red Cross **90** (870): 441-459. At page 444.

[316] **van Dijk**, **J. J. M.** (1986). Viktimologie in Theorie und Praxis. Verbrechensopfer, Sozialarbeit und Justiz. H. Janssen and H.-J. Kerner. Bonn, Eigenverlag der Deutschen Bewährungshilfe e.V.**:** 3-24. At page 19.

It has also been found, that victims feel the need to be shown respect and appreciation of their experience.[318]

An interesting point made in the study is that the victim as well as the perpetrator needs to be reintegrated into society.[319]

In summary, it is fair to say, that there is a clear lack of a representative amount of information on what victims really want themselves from an international criminal trial and that empirical research on this topic is needed. It is necessary to find out how victims experience their participation in the proceedings before the ICC and also why certain victims do not participate or do not want to do so. It is clear that the process of finding out all wishes and needs of victims will be subject to logistical constraints, but a greater effort than has been made seems possible nevertheless. Of course this is victimological work and does not fall directly within the tasks and responsibilities of the ICC.[320] However, both victims and the ICC will profit from such work as no false promises or expectations will be made or created respectively and alternatives can be arranged if the ICC cannot fulfil victims' expectations. The ICC will not want nor be able to accommodate all individual interests. However, a strategy must be found, for how to cope with the fact that victims individual interests do not necessarily coincide with those of the ICC. From the findings above, there appears to be a risk of a discrepancy between what is intended by the ICC and by what is desired by victims. For example, victims may not want to participate before an international court at all or they may possibly want their own interests such as telling their stories, therapeutic healing etc. to be considered more than legal considerations which at present is not the case at the ICC.

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[317] **Kool**, **R.** and **M. Moerings** (2004). "The Victim has the floor." European Journal of Crime, Criminal Law and Criminal Justice **1**(1): 46-60. At page 52.

[318] **Shapland**, **J.**, **J. Willmore**, et al. (1985). Victims in the Criminal Justice System. Aldershot, Gower Publishing Company Limited. At page 176.

[319] This has been pointed by **Schneider**, **H. J.** (1990). "Das Verbrechensopfer: die zukünftige Hauptperson der Kriminalitätskontrolle." Universitas **45**(529): 627-636. At page 634.

[320] Note **Mawby**, **R.** and **M. Gill** (1987). Crime Victims. London, New York, Tavistock Publications. Pp. 127, 131 and 133, 134, who emphasizes the distinction between the needs of victims and the rights of victims. He observes that while it is undisputed that crimes leads to various needs, it is disputed whether the state is obliged to meet the needs. Victims may furthermore have rights irrespective of their needs.

IV. Conclusion

In conclusion, we may observe, that in its punishment purposes and through victims' participatory rights, the ICC envisages consideration of victims and their interests but only in a manner ancillary to its primary task which consists of the protection and assertion of collective interests.

Contrasting the needs and desires of victims with the ICC's aims makes it seem inevitable that there will sometimes be conflicts between the interests of victims and the Court. This may lead to disappointment for victims even if their interests may coincide at other points.

It may be possible to take this into account when interpreting and applying the provisions of the ICC and to find solutions. However, some fundamental discrepancies will probably remain. This seems to be a danger inherent in the structure of a criminal trial, especially an international one, and the possibilities it offers, when the various interests of victims are taken into account.

This conclusion already demonstrates that the ICC should ensure that victims are given a realistic assessment of their possibilities before they become involved in proceedings at the ICC. If the ICC gives the impression of being extremely victim-friendly without clarifying the restrictions on the trial process and its role and function, victims are sure to become frustrated with and disappointed in the process.

C. The notion of "victim"

The precondition for any right to participate in the proceedings is a recognition by the Court that a person qualifies as a "victim".[321] Such recognition may also have an effect, at least indirectly, on possible reparation proceedings.[322]

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[321] It seems that the Statute and Rules with Art. 68(3) and Rule 85 establish a two-fold process: first, the applicant must fulfil the criteria set out in Rule 85, then the Chamber will examine the preconditions of Art. 68(3); see Prosecutor, Situation in the Democratic Repulic of the Congo in the Case of **Prosecutor vs. Thomas Lubanga Dyilo,** Prosecution`s Observations concerning the Status of Applicants VPRS 1 to 6 and their Participation in the case of 7 April 2006, ICC Case No. ICC-01/04-01/06, at para. 7.

In determining the beneficiaries of the Trust Fund, reference is also made to the definition of "victim" in the Rules.[323] Furthermore, it seems likely that being recognised as a "victim" before the ICC can have an impact beyond the Court in terms of psychological, societal or political consequences as well as influence on national jurisdiction.

The concept of "victim" has been and still is a very contested one in international law so that the position the ICC takes on this matter will be important.

In the Rome Statute there is no definition of the term "victim", but there is a definition in the RPE, *Rule 85*, Section III. Section III provides a special division with the headline "victims and witnesses". There, the term "victim" has been defined as follows: "*For the purpose of the Statute and the Rules of Procedure and Evidence: (a) "Victims" means natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court; (b) Victims may include organizations or institutions that have sustained direct harm to any of their property which is dedicated to religion, education, art or science or charitable purposes, and to their historic monuments, hospitals and other places and objects for humanitarian purposes.*"

This definition departs considerably from that contained in the rules of the ICTs, namely through being of practical interest and relevance: victims are being conceded rights in the Statute and RPE that do not relate to them being witnesses. Victims can for example participate in the proceedings in their capacity as victims[324] and coming within the scope of the definition is a precondition for such participation. The definition found at the ICC is not only much broader than its predecessors at the ICTs but it also differs in its details, a point which will be discussed below.

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[322] The issues of reparations and participation are separate before the ICC. The Statute and Rules do not require victims to participate in the proceedings in order to be eligible for reparations. Victims may participate in the proceedings and yet request that the Court does not make an order for reparations, Rule 95. A victim may choose to not be involved or represented in the different stages of the proceedings, but yet file an application for reparations. Further Rule 75 (2) displays separate terms in comparison to Rule 85.

[323] Regulation 42 Trust Fund Regulations reads: "The resources of the Trust Fund shall be for the benefit of victims within the jurisdiction of the Court, as defined in rule 85 of the Rules of Procedure and Evidence, and, where natural persons are concerned, their families".

[324] Art. 68(3) Rome Statute.

I. Development of the term since the establishment of the ICTs

Prior to the adoption of the definition of the term "victim" in Rule 85 there were proposals for a different definition then provided for by the ICTs. A wider definition was suggested, for example, by van Boven in his report to the UN intituled Basic Principles and Guidelines on the right to reparation for victims of gross violations of human rights and international humanitarian law[325] and by Bassiouni in the "Final report of the Special Rapporteur"[326] for the purpose of reparations.[327]

Discussions regarding the role of victims did not take place in the preparation of the Rome Statute until the 1999 Paris Seminar. In Paris, another definition was proposed with regard to the elaboration of the RPE, which was close to the definition of van Boven.[328] Another wide definition was proposed at the inter-sessional meeting held in Siracusa,

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[325] Doc. UN E/CN.4/1997/104 of January 16th 1997, Annex, compared to the ICTs Definitions this definition is more clear in some points, it comprises collective victims and immediate family and dependents or other persons or groupsof persons closely connected with the direct victim and on the other hand is clearly restricted to the direct victim; http://documents-dds-ny.un.org/doc/UNDOC/GEN/G97/101/71/pdf/G9710171.pdf?OpenElement.

[326] E/CN.4/2000/62 of January 18th 2000, Annex : A person is "a victim" where, as a result of acts or omissions that constitute a violation of international human rights or humanitarian law norms, that person, individually or collectively, suffered harm, including physical or mental injury, emotional suffering, economic loss, or impairment of that person's fundamental legal rights. A "victim" may also be a dependant or a member of the immediate family or household of the direct victim as well as a person who, in intervening to assist a victim or prevent the occurrence of further violations, has suffered physical, mental, or economic harm; this definition further contains different forms of "harm" http://documents-dds-ny.un.org/doc/UNDOC/GEN/G00/102/36/pdf/G0010236.pdf?OpenElement.

[327] As for a more detailed picture see **Shelton**, **D.** (2005). The UN Principles and Guidelines on Reparations: Context and Contents. Out of the ashes. K. De Feyter, S. Parmentier, M. Bossuyt and P. Lemmens. Antwerpen, Intersentia**:** 11-33. pp. 15 et seq.

[328] See Doc. PCNICC/1999/WGRPE/INF/2, Annex I, Rule X (article 15) Definition of victim1:

1. "Victim" means any person or group of persons 2 who individually or collectively, directly or indirectly, suffered harm as a result of crimes within the jurisdiction of the Court.

2. "Harm" includes physical or mental injury, emotional suffering, economic loss or substantial impairment of fundamental rights; http://documents-dds-ny.un.org/doc/UNDOC/GEN/N99/203/37/pdf/N9920337.pdf?OpenElement.

3. "Victims", where appropriate, may also be organizations or institutions which have been directly harmed.

from 31 January to 6 February 2000, it circulated at the request of Italy and the Netherlands.[329]

The definition of the notion of "victim" was the subject of a lengthy debate in the Working Group on June 14, based on Rule Q in Chapter 9 of the Mont Tremblant document and a proposal by several Arab states. During this debate, while a number of delegations expressed strong support for the definition in Rule Q, many delegations raised concerns regarding specific aspects of this definition. Subsequently the Coordinator, Silvia Fernández de Gurmendi, introduced a new version in the Coordinator's text[330] on June 20. The vast majority of states that spoke supported the Coordinator's text as well-balanced and while several would have preferred a more detailed text and/or still had specific concerns, they appreciated that it would not be possible to achieve consensus on the wording of such a text. The final text adopted by the Working Group on June 29[331] was in substance the same as the coordinator's text with only grammatical changes, except for an amendment replacing "illegal entities" with "organizations or institutions."[332]

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[329] PCNICC/2000/WGRPE/INF/1;Chapter 9 of the Mont Tremblant text; Rule Q: For the purpose of the Statute and the rules of procedure and evidence: "Victims" means persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through conduct that constitutes a crime within the jurisdiction of the Court. The term "victim" also includes, where appropriate, the immediate family or dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization. The term "victim" also includes, where appropriate, organizations or institutions that have been directly harmed.

[330] See PCNICC/2000/WGRPE(2)/RT.4; http://documents-dds-ny.un.org/doc/UNDOC/GEN/N00/485/41/pdf/N0048541.pdf?OpenElement.

[331] Contained in document PCNICC/2000/WGRPE/L.9, http://documents-dds-ny.un.org/doc/UNDOC/LTD/N00/502/96/pdf/N0050296.pdf?OpenElement.

[332] Report from CICC Draft Report on the Fifth Session of the Preparatory Commission June 12-30, 2000 Coalition for an International Criminal Court July 24, 2000, at page 12.

The finalized draft text of June 2000 was adopted as draft Rule 85 and subsequently adopted in the Rome Statute in September 2002.[333] Rule 85 therefore represents a compromise from the lengthy discussions of the Preparatory Commissions.

In March 2001, the Council of the European Union adopted a framework decision on the standing of victims in criminal proceedings.[334] Apart from this measure, a number of other international conventions were created in which the position of the victim was further strengthened.[335]

On 16 December 2005, the General Assembly of the UN adopted the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law.[336] This action by the General Assembly followed adoption of the Principles by the Commission on Human Rights on 19 April 2005. The Basic Principles and Guidelines are the result of more than 15 years of work by independent experts. They adopt a victim-oriented perspective and clarify the scope of the right to a remedy and outline what can be done to realize it.[337]

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[333] See ICC Doc. ICC-ASP/1/3, http://documents-dds-ny.un.org/doc/UNDOC/GEN/N02/603/35/pdf/N0260335.pdf?OpenElement.

[334] See 2001/220/JHA at http://eur-lex.europa.eu/LexUriServ/site/en/oj/2001/l_082/l_08220010322en00010004.pdf.

[335] See thereto more comprehensively **Joutsen, Matti**. The Internationalization of Victimology. in: Festschrift für Hans Joachim Schneider, Kriminologie an der Schwelle zum 21. Jahrhundert, Berlin, Walter de Gruyter, 1998: pp. 353-367.

[336] See General Assembly Resolution 60/147, http://www.ohchr.org/english/law/remedy.htm

[337] With regard to the definition of "victim" the Basic Principles state: "For purposes of the present document, victims are persons who individually or collectively suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that constitute gross violations of international human rights law, or serious violations of international humanitarian law. Where appropriate, and in accordance with domestic law, the term "victim" also includes the immediate family or dependants of the direct victim and persons who have suffered harm inintervening to assist victims in distress or to prevent victimization.", see United Nations Document A/C.3/60/L.24 of 24 October 2005, Annex, V., 8.; http://documents-dds-ny.un.org/doc/UNDOC/LTD/N05/567/49/pdf/N0556749.pdf?OpenElement.

II. Scope of the definition

One important question regarding the definition of the term "victim" as provided in the ICC Rules, is how the scope of this term will be interpreted. A broad or on the other hand a narrow interpretation can take place firstly on a temporal level as a person can be recognised as victim at an early or late stage of the proceedings. On a factual level further scope for interpretation arises in the manner in which the different objective elements of the definition are interpreted.

A broad definition might pose a problem of logistic constraints. With a large number of victims the Court could be overwhelmed by their full participation in the proceedings. If on the other hand the definition is too narrow, victims might get the impression that it is difficult or even virtually impossible to qualify as victim. Actually something like a „victim elite" might emerge which because of greater financial resources or better access to information have a better chance of participating over less well-off or well-positioned persons.

In the Preparatory Commissions it was considered absolutely necessary to devise a realistic system that would satisfy those who had suffered harm without jeopardizing the Court's ability to proceed against those who had committed the crimes.[338]

This section will first examine the temporal interpretation of the concept of victim before later examining the individual elements of the definition of victim in Rule 85 to determine the actual scope of the term.

At what point of the proceedings can a person qualify as a victim under the ICC definition ? There are a number of possibilities which are conceivable in principle. A criminological perspective suggests that a person qualifies as a victim following the commission of a crime against that person or his or her interests.[339] Within criminal proceedings a person

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[338] **Fernández de Gurmendi**, **S. A.** (2001). The Elaboration of the Rules of Procedure and Evidence. The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence. R. S. Lee. Ardsley, New York, Transnational Publishers**:** 235-257. At page 256.

[339] **Joutsen**, **M.** (1987). The Role of the Victim of Crime in European Criminal System: A crossnational study of the role of the victim. Helsinki, Heuni. At page 19.

can be recognized as a victim as soon as he or she comes to the attention of the authorities. Ordinarily, this will occur at the moment he or she reports a crime to the criminal justice authorities. A second option is to recognize the purported victim from the moment he or she acquires a formal position and role within the criminal justice system. A third possibility would be to recognize someone as victim only after the court has established the guilt of the accused.

The wording of Rule 85 seems to correspond with the criminological definition by referring to the "commission of a crime". Only the fact that the wording refers to harm "suffered" – implying that the commission of the crime will have been in the past - could suggest that recognition as a victim is something that takes place after the commission of the crime. Thus, the wording seems not to relate to the moment of the conviction. There is no word of qualification regarding the crime's commissions such as "allegedly" that suggests that the status of the victim is not established until a decisions is made regarding the commission of the crime in the final judgement.

However, from the context of the Statute it becomes apparent that victims do not gain any rights at the point of the commission of a crime or through reporting a crime. For most rights, the Statute provides for certain preconditions that have to be fulfilled before protection applies or participation as a victim is impossible, etc.[340] There is no separate procedure for establishing a person's status as a victim. Such a procedure was suggested by Spain in the Paris Seminar but was opposed by other delegations arguing that the definition in Rule 85 and the procedure outlined in Rule 89 were sufficient[341], so that in the end, no such procedure was adopted in the Rome Statute.

In summary, it can be observed that recognition as a victim for the purpose of participation is linked to certain procedural acts such as an application. Whether this

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[340] See below pages 142 et seq. As to participation according to Art. 15(3) or Art. 19(3) the requirements are, admittedly, lower.

[341] See **Bitti**, **G.** and **H. Friman** (2001). Participation of Victims in the Proceedings. The International Criminal Court, Elements of Crimes and Rules of Procedure and Evidence. R. S. Lee. Ardsley, New York, Transnational Publishers**:** 456-474. At page 461.

status is accorded early in the proceedings depends on the point of the proceedings at which participation is allowed. As will be seen this question is controversial.[342]

Furthermore, it should not be forgotten that victim status is only preliminary since the final evaluation of evidence will only be made during the trial.[343]

III. Possible terminological alternatives

If recognition of a person's status as a victim under the ICC Rules depends on certain procedural conditions then why does the Rome Statute not contain a procedure-related term? It seems that the term "victim" is not one generally to be found in procedural law. Instead, the legal terminology uses such terms as "complainant", "plaintiff", "subsidiary prosecutor", etc.[344] This question is all the more relevant as the definition in Rule 85 brings up a serious problem: a conflict with the presumption of innocence.[345] This arises having somebody defined as a victim at a very early stage of the proceedings which appears to presuppose that a crime has been committed, even though this remains to be proven at trial.[346] However, a successful application to participate will mean that the

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[342] See below Chapter "participation in the investiagations".

[343] See **Timm**, **B.** (2001). The Legal Position of Victims in the Rule of Procedure and Evidence. International and National Prosecution of Crimes under International Law. H. Fischer, C. Kreß and S. R. Lüder. Berlin, Berlin Verlag**:** 289-307. at page 297; see also Rule 91(1).

[344] See e.g. the Austrian Code of Criminal Procedure where the denomination as "victim" is not used even if it does feature for instance in the Austrian Victim Support Act. The term "injured person" features sporadically in the Code of Criminal Procedure but the terms predominantly used are those procedure-related terms of "Civil claimant" in §§ 47 et seq. of the Code and "private prosecutor" (§ 46 et seq" or "subsidiary prosecutor" (§ 48 et seq.); in France the victims participates as "partie civile", see arts. 2 et seq. of the French Code of Criminal Procedure; in Germany although reference is made to the term "injured person", the predominantly used term is that of "Nebenkläger" (subsidiary prosecutor) in §§ 395 et seq of the German Code of Criminal Procedure. In the Swedish Code of Judicial Procedure, chapter 20, § 8, the term "plaintiff" is defined as one against whom a crime has been committed or one who has been affronted by a crime or has suffered injury due to a crime. The plaintiff is formally considered a party in a trial only when he or she addresses the court, that is, when he or she presents a claim for liability or compensation; see also Joutsen, M. (1987). The Role of the Victim of Crime in European Criminal System: A crossnational study of the role of the victim. Helsinki, Heuni. At page 19.

[345] See Art. 66 Statute.

[346] See thereto **Doak**, **J.** (2005). "Victims' Rights in Criminal Trials: Prospects for Participation." Journal of Law and Society **32**(2): 294-316. At page 296, footnote 8, saying that the very designation of an individual as a `victim' may give rise to an inherent implication that the allegations made by that person ought to be accepted as the historical truth before the tribunal of fact has arrived at its determination as to the guilt of the accused; see also **Calvo-Goller**, **K. N.** (2006). The Trial Proceedings of the

victim is accorded status as a "victim" chronologically much earlier than the handing down of the judgement.

In response, it may be argued that the presumption of innocence is not threatened because it is not the person's status as victims that is in question, only whether the accused was the perpetrator.[347] This will, however, depend on the case. There may be cases where the status of the victim is very much in question. For example, a defendant accused of the war crime of unlawful deportation may concede that there was deportation, but argue that under the circumstances it was lawful. If it was lawful, then no crime was committed and there are no victims, since there is no such thing as a "crime-less victim" as far as the ICC is concerned. Thus, the very question in issue in that case is whether or not there were victims.[348] Even if a Court may ostensibly separate the legal questions of qualifying as victim on the one hand and the question of the guilt or innocence of the accused on the other hand, an initial impression may remain in the mind of the Court, public and/or media.

This could be prevented by adding the word "allegedly" to the definition of victim as in the definition of the ICTs[349] [350] without awarding them any different rights. The only

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International Criminal Court ICTY and ICTR Precedents. Leiden, Boston, Martinus Nijhoff Publishers. At page 245; see also **Schwinghammer, Hanna**. Opfer- und Zeugenschutz vor internationalen Gerichten in: Völkerstrafrecht. Kühne, Esser, Gerding. Osnabrück, Julius Jonscher Verlag, 2007: pp.341-366. At page 342.

[347] See for example **Bitti**, **G.** and **G. González Rivas** (2006). The Reparations Provisions for Victims Under the Rome Statute of the International Criminal Court. Redressing Injustice through Mass Claims Processes: Innovative Solutions to Unique Challenges. Oxford**:** 299-322. At page 307 referring to para. 2 of the UN Declaration of Basic Principles of Justice for Victims of Crimes and Abuse of power and to para. 9 of the Principles and Guidelines on the Right to a Remedy and Reparations for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law which state that the determination of an accused's guilt is distinct from the determination that an individual is a victim with a right to participate.

[348] **Jones**, **J. R. W. D.** (2002). Protection of Victims and Witnesses. The Rome Statute of the International Criminal Court, A Commentary. A. Cassese, P. Gaeta and J. R. W. D. Jones. Oxford, Oxford University Press. **2:** 1355-1370. At page 1357.

[349] See for example Rule 2 a RPE ICTY: "Victim: A person against whom a crime over which the Tribunal has jurisdiction has allegedly been committed".

[350] Such a solution is recommended by **Scomparin**, **L.** (2005). Il ruolo della vittima nella giurisdizione penale internazionale: alla ricerca di una possibile mediazione fra modelli processuali. Problemi Attuali Della Giustizia Penale Internazionale. A. Cassese, M. Chiavario and G. De Francesco. Torino, Giappichelli Editore**:** 365-398. At page 366; as for a similar assessment see **Calvo-Goller**, **K. N.** (2006).

difference would be that their position would not be acknowledged definitely until the final conviction. As noted above, the victim only assumes a preliminary position so that materially there is no difference to their designation as a "victim". The difference would therefore only be psychological as the victim might feel that he or she has to prove that he or she really is a victim, being "accused" of not being a victim. In fact, even if the word is not mentioned in the definition, in decisions so far the word "allegedly" has been used frequently.[351]

Another alternative could be to avoid having a definition of "victim" at all. In the Preparatory Commissions such a solution was discussed. Japan, in particular, proposed having no definition at all.[352]

This solution could have the disadvantage of not giving applicants any indication of what to consider in their application, thus giving rise to legal uncertainty if no such indications are given elsewhere in the Statute or Rules.

A final alternative would be to give a person a procedure-related label. This is problematic insofar as the procedural powers of victims are not yet fully clarified and will probably not be the same as those in national law.[353] If victims were, for example, called "plaintiffs" this could be misunderstood as according victims the same procedural status as "plaintiffs" in national law. In this case, much more detailed rules on participation

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The Trial Proceedings of the International Criminal Court ICTY and ICTR Precedents. Leiden, Boston, Martinus Nijhoff Publishers. At page 245 where it is stated that the only way Rule 85 can be interpreted so as not to infringe on the rights of the accused, is that Rule 85 refers to a *prima facie* claim that a crime within the jurisdiction of the Court has been committed.

[351] See PTC I, **Situation in the Democratic Republic of the Congo**, Decision on the applications for participation in the proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6 of 17 January 2006, Case No. ICC-01/04, para. 92; PTC I, **Situation in the Democratic Republic of the Congo,** Decision on the Prosecutor's application for leave to appeal the Chamber's decision of 17 January 2006 of 31 March 2006, Case No. ICC-01/04-135-tEN, para. 48.

[352] **Fernández de Gurmendi**, **S. A.** (2001). Definition of Victims and General Principles. The International Criminal Court, Elements of Crimes and Rules of Procedure and Evidence. R. S. Lee. Ardsley, New York, Transnational Publishers Inc.**:** 427-434. At page 432.

[353] See **Donat-Cattin**, **D.** (1999). Art. 68 "Protection of victims and witnesses and their participation in the proceedings". Commentary on the Rome Statute of the International Criminal Court. Observers´Notes Article by Article. O. Triffterer. Baden-Baden, Nomos Verlagsgesellschaft. At page 872.

would become necessary even though the drafters deliberately avoided doing so in order to leave room for flexibility.

Furthermore, the concept of "victim" in criminology and victimology is, in many respects, broader than the concept of, for instance, a "complainant" in law. However, as victims do not actually benefit from this wide interpretation of the concept as he or she is ultimately still bound to follow and fulfil certain procedural rules, it is not apparent which disadvantages there really could be in adopting a procedure-related definition.

Another argument against such a procedure-related solution could be that there would then be no uniform terminology, for instance, for participation and reparation. In the Preparatory Commissions it was stated that uniform terminology was desirable for the entirety of the proceedings.[354] In any case, the wording in Art. 75 introduces different elements from Rule 85 RPE.

Against a procedure-related term it has also been argued that the term "victim" is most suitable in underlining the individual dimension of having suffered the crime and that it displays a harmonisation of juridical and common language, a "de-technization" of law.[355] There may even be fears that discarding the concept of victimhood could lead to a denial of human suffering, a blindness to injustice and cruelty and an abdication of moral responsibility. Removing the concept of victimhood might therefore be counterproductive, leading to the argument that there are no real victims.

However, it has also be found that victims themselves do not necessarily want to be called "victims" or be given this role. It is important to remember that many survivors of mass atrocities resent being labelled as victims by third persons.[356] Stover argues that the term

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[354] See **Stehle**, **S.** (2006). Das Strafverfahren als immaterielle Wiedergutmachung. Frankfurt am Main. At pp 237 et seq.

[355] **Scomparin**, **L.** (2005). Il ruolo della vittima nella giurisdizione penale internazionale: alla ricerca di una possibile mediazione fra modelli processuali. Problemi Attuali Della Giustizia Penale Internazionale. A. Cassese, M. Chiavario and G. De Francesco. Torino, Giappichelli Editore**:** 365-398. At page 366.

[356] See **Stover**, **E.** (2005). The Witnesses

War Crimes and the Promise of Justice in The Hague. Philadelphia, University of Pennsylvania Press. At page 4/5; see also **Lu**, **C.** (2004). Victimhood, Retribution, and the International Criminal Court as an

directs attention to perpetrators and to the damage they have inflicted on others, that it robs individuals who have survived terrible events of their individuality and oversimplifies what are essentially complex personal and social losses. Thus some persons prefer the term "survivor" which implies resilience and strength in overcoming adversity.[357]

Etymologically the term victim descends from the latin word "victima" which had the original sense of a "person or animal killed as a sacrifice."[358] This etymology seems to match the perception of victims in society whose defining feature is often said to be their powerlessness[359], maybe even pathologizing and thereby pushing the victim out of society.[360] Whether this proves to be true depends of course on the society' actual perceptions which may change and can also be influenced by the jurisprudence of the Court.

Finally it should not be forgotten that the very concept of „victim" is a cultural construct. In African and Asian societies, for example, "victim" is understood in a broader sense and encompasses the person's immediate family and community.[361] This might lead to a different understanding of the term.

Institution of Moral Regeneration. The Highway the International Criminal Court: all roads lead to Rome. H. Dumont and A.-M. Boisvert. Montréal, Les Editions Thémis**:** 363-371. at page 367 who points out that even if media and psychology books have increasingly poined out that everyone wants to be a victim, victims have vehemently argued that they are not victims; see also **Lamb**, **S.** (1999). Constructing the Victim. New Versions of VictimsFeminist Struggle with the Concept. S. Lamb. New York and London, New York University Press**:** 108-135. Pp 119 et seq.

[357] **Stover**, **E.** (2005). The Witnesses War Crimes and the Promise of Justice in The Hague. Philadelphia, University of Pennsylvania Press. At page 5.

[358] See Online Etymology Dictionary at http://www.etymonline.com/index.php?search=victim&searchmode=none.

[359] **Lu**, **C.** (2004). Victimhood, Retribution, and the International Criminal Court as an Institution of Moral Regeneration. The Highway the International Criminal Court: all roads lead to Rome. H. Dumont and A.-M. Boisvert. Montréal, Les Editions Thémis**:** 363-371. At page 367.

[360] See **Lamb**, **S.** (1999). Constructing the Victim. New Versions of Victims. Feminist Struggle with the Concept. S. Lamb. New York and London, New York University Press**:** 108-135. At pages 108,109 who says that being victimized has become equivalent to having a chronic mental illness.

[361] See **Rauschenbach, M., D. Scalia** (2008). „Victims and international criminal justice: a vexed question?" International Review of the Red Cross **90** (870): 441-459. At page 454.

It is necessary to examine whether the definition of victims provides for rights for persons coming within this term. With regard to notification, Rule 92 para. 2 provides that victims that have communicated with the Court but who have not necessarily participated yet can also have notification rights. At first glance, it seems that only those who fit within the definition can have this right. In fact at this point of the proceedings the Court has not verified whether a person really is a "victim" in the sense of Rule 85. Thus in theory the same right could accrue to any person that claims to have an interest in participating at a later stage in the proceedings.

It seems that the decisive factor in obtaining protection according to Rule 87 is not that a person qualifies as a victim but that a person is at risk on account of giving testimony. At this point, too, the rights awarded would be the same if the victim had a procedure-related title.

It is submitted that there are advantages as well as disadvantages to having different terminology as well as to a procedure-related title. In the long run such a term could be reconsidered, but this would mean a complete reworking of the provisions which will only be possible if at all when the position of victims in the procedure is very clearly defined.

IV. Natural persons

As regards the individual elements of Rule 85, it is first necessary to verify who can be subject to Rule 85. Rule 85 (a) provides that in principle only natural persons can be victims, whereas Rule 85 (b) establishes that as an exception to that rule, organizations and institutions can be victims provided that certain additional conditions are fulfilled.

A "natural person" can be any person who is not a legal person.[362] This definition is unequivocal. The only point which might be debated is whether the definition encompasses groups of natural persons that do not constitute institutions or organizations. In a group first of all every individual person is a natural person. Whether this group of

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[362] See PTC I, **Situation in the Democratic Republic of the Congo**, Decision on the applications for participation in the proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6 of 17 January 2006, Case No. ICC-01/04, para. 80.

natural persons is admitted to participate as a group is therefore not a question of whether the members are natural persons but rather a question of their being admitted collectively.[363]

Organizations and institutions can, according to Rule 85 (b), only be victims if they have sustained direct harm. In addition, the harm has to be directed at their property, which must be dedicated to religion, education, art or science or charitable purposes, and to their historic monuments, hospitals and other places and objects for humanitarian purposes. The wording therefore sets limits insofar as not every economic interest will be sufficient.

Undefined notions such as „direct harm“ and „dedication to religion, education, art or science or charitable purposes" or "places and objects for humanitarian purposes" call for interpretation. Hitherto no application by an organization or institution has been filed and thus the Court has not yet addressed any of the above questions.

The reference to legal entities reflects the reality that the perpetration of certain crimes such as, for example, war crimes under Art.8(2)(b)(ix) and Art.8(2)(e)(ii) and (iv), are directed against legal entities which therefore deserve to be characterized as victims.[364]

Otherwise it is unclear how restrictively Rule 85 (b) will be interpreted. It could for example be arguable whether legal persons can only be victims in connection with reparations. During the Preparatory Commissions Canada suggested that organisations and institutions could be victims for the purposes of reparations only, and the Ukraine recommended that they qualify only when material damage was suffered.[365]

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[363] Concerning this matter see below pages 93 et seq.

[364] **Kittichaisaree**, **K.** (2001). International Criminal Law. Oxford, Oxford University Press. At Page 299; **Fernández de Gurmendi**, **S. A.** (2001). Definition of Victims and General Principles. The International Criminal Court, Elements of Crimes and Rules of Procedure and Evidence. R. S. Lee. Ardsley, New York, Transnational Publishers Inc.**:** 427-434. At page 433; **Timm**, **B.** (2001). The Legal Position of Victims in the Rule of Procedure and Evidence. International and National Prosecution of Crimes under International Law. H. Fischer, C. Kreß and S. R. Lüder. Berlin, Berlin Verlag**:** 289-307. At page 291.

[365] See CICC 4th Preparatory Commission Report, March 2000, http://www.iccnow.org/documents/4thPrepComReportMarch2000.pdf?PHPSESSID=cba4ff8ece8f5f864fb4a750fbaaf4a7.

The wording of Rule 85, which according to Art. 21(1)(a) must be considered first, no longer incorporates these suggestions. Instead a standard definition for participation and reparations was chosen. This could on the one hand mean that the suggestions are deliberately not reflected in the wording. On the other hand it could mean that the decision was left to the discretion of the Court. Suggestions to narrow the wording were made in apprehension of a situation where extending the definition to legal persons might privilege powerful commercial corporations, thereby diverting the limited resources of the Court from individual victims.[366]

It is arguable whether the consideration of natural or rather of juridical persons corresponds with the aims of the ICC.

The author is of the opinion that reconciliation, to give but one example, is in fact a matter of reconciling natural rather then legal persons, the latter's interests being rather of economic character. The right to participate personally should therefore in general be restricted to natural persons while retaining the possibility for legal persons to obtain reparations.

Another limitation could then be that only legal persons that do not have strictly economic aims are covered by the definition. However, such a classification is not prima facie required by the wording of Rule 85. The identification of a legal person's aims could also be very difficult.

There are no definite principles or rules on the matter in international law either: The European Court of Human Rights ("ECHR") restricts the access of legal persons to victim status to "non-government organizations" ("NGOs")[367] but the Court has recognized that also corporations can have the status of victim and injured party under the ECHR. They are also entitled to compensation for pecuniary damage. [368] The fact that an organisation

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[366] **Fernández de Gurmendi**, **S. A.** (2001). Definition of Victims and General Principles. The International Criminal Court, Elements of Crimes and Rules of Procedure and Evidence. R. S. Lee. Ardsley, New York, Transnational Publishers Inc.**:** 427-434. At page 433.

[367] See Art. 34 European Convention.

[368] **van Emmerik**, **M. L.** (2000). Schadevergoeding bij schending van mensenrechten. De rechtspraktijk onder het E.V.R.M. vergeleken met die in Nederland. Leiden, Stichting NJCM-Boekerij. At page 135.

is an NGO does not, however, necessarily mean that it does not pursue primarily financial interests. It should also not be forgotten that some NGOs had a great impact on the drafting of the Statute.

The extent to which extent legal persons will be able to influence the proceedings before the ICC has ultimately been left to the discretion of the Court, as can be seen from the wording of Rule 85(b) which states that "...victims may include organizations...". So far only natural persons have been admitted to the proceedings, while the overall number of victims admitted to the proceedings is still very low.

V. Harm

The term "harm" is not defined in either the Statute or in the Rules. Traditionally "harm" is required to be "real", that is, to have resulted in proven and personal harm – whether the victim is effected directly or indirectly by the wrongful act.[369] As for the accepted kinds of harm, at first glance it appears that "harm" might be a generic term, comprising all different kinds of harm such as physical and mental injury, emotional suffering, economic loss and substantial impairment of fundamental rights.

The definition of "victim" discussed in the Preparatory Commissions included all these kinds of harm[370], however no consensus was reached on the exact content of "harm"[371] so that its precise meaning was left open in the end.

In its first decision, the Pre-Trial Chamber ("PTC") has stated that "the Chamber must interpret the term harm on a case-by-case basis in the light of Art. 21(3) of the Statute, according to which "[t]he application and interpretation of law pursuant to this

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[369] Compare similarly Defence, Situation in the Democratic Republic of the Congo in **Prosecutor vs. Thomas Lubanga Dyilo,** Defence submissions regarding the applications for participation in the proceedings of applicants a/0004/06 to a/0052/06 of 4 September 2006, para. 64.

[370] See UN Doc. PCNICC/1999/INF/2 and PCNICC/1999/L.5/Add.1n.8; http://documents-dds-ny.un.org/doc/UNDOC/GEN/N99/224/92/img/N9922492.pdf?OpenElement.

[371] See CICC 4th Preparatory Commission Report, March 2000, http://www.iccnow.org/documents/4thPrepComReportMarch2000.pdf?PHPSESSID=cba4ff8ece8f5f864fb4a750fbaaf4a7

article must be consistent with internationally recognized human rights".[372] Pre-Trial Chamber I further noted that the purpose of the decision was not to make a definitive determination on the harm suffered by the victims, as this would be determined subsequently, where appropriate, by the Trial Chamber in the context of a case. PTC I considered, moreover, that the determination of a instance of harm suffered was sufficient, at that stage of the proceedings, to establish a person's status as victim.[373] Thus the precise scope of the term "harm" was not clarified in the decision. This may be because the decision was handed down at a very early stage of the proceedings. The ICC made statements on the categories of possible harm which may be helpful in the future, which, however, were not definitive.

In terms of context it can be seen that Art. 6(b) of the Statute contains the term "serious bodily or mental harm" so that it can be inferred that these kinds of harm are also contained in the definition of Rule 85.

Physical and mental harm have also been acknowledged as harm in the 1985 Victims Declaration[374], in the 2005 Principles[375], before the Interamerican Court[376] and the European Court[377], too. There seems, therefore, to be no doubt but that physical and mental harm will be included under the definition of "harm".

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372 See PTC I, Situation in the Democratic Republic of the Congo, Decision on the applications for participation in the proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6 of 17 January 2006, Case No. ICC-01/04, para. 81; see also **Greco, G.** "Victims' Rights Overview under the ICC Legal Framework: A Jurisprudential Analysis." International Criminal Law Review 7 (2007): pp. 531-547. At page 536.

373 See PTC I, **Situation in the Democratic Republic of the Congo**, Decision on the applications for participation in the proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6 of 17 January 2006, Case No. ICC-01/04, para. 82.

374 See Art. 1.

375 See Principle 8.

376 See e.g. **Velásquez Rodríguez vs. Honduras,** judgement of 29 July 1988, Series C No. 4, para. 187, where the Inter-American Court held that prolonged detention in specific circumstances was detrimental to physical and moral integrity, and hence a form of harm.

377 See e.g. judgement in the **Selmouni vs. France** case of 28 July 1999, Application no. 25803/94, paras. 105 et seq., there the European Court held that torture was an assault on a person's physical and moral integrity and hence constituted harm.

But what about the other kinds of harm?

Emotional harm was recognized as a form of "harm" in the 1985 Victims Declaration[378], the 2005 Victims Principles[379], the jurisprudence of the Inter-American Court of Human Rights ("ICHR")[380], and the ECHR[381] but only in the context of reparations. As for victim participation there has not yet been any international case law on the issue, therefore, the aforementioned jurisprudence could be applied accordingly. As one single definition has been created for both participation and reparation in Rule 85 it seems that this definitional overlap allows for the application of the aforementioned jurisprudence. Indeed, the text of Art. 75 contains elements applicable for reparations which are not mentioned in Rule 85. Nevertheless it can be assumed that a single definition was intended as Art.75 was adopted prior to Rule 85. The ICC in its decision on victim participation also applies, as regards the notion of victim, jurisdiction that has originally been issued in the context of reparations.[382]

With regard to the applicability of the Victims Declaration it should be mentioned that it is by no means binding on the ICC.[383] However, it is interesting to see that it was recognized during the negotiations of the Rome Statute and the ICC's Rules of Procedure

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[378] Para. 1, para.18 G.A. Resolution 40/34, 19 November 1985, fortieth session, UN Doc. A/RES/40/34.

[379] Principle 8 of the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights law and Serious Violations of International Humanitarian Law.

[380] **Aloeboetoe et al. vs. Suriname**, Judgement of 10 September 1993, Ser. C, No. 15, para. 20 et seq.; **Blake vs. Guatemala**, Judgement of 24, 1998, Ser. C, No. 36, para. 116; Neira **Alegria et al. vss. Peru**, judgement of 19 September 1995; Ser. C, No. 20, paras.56, 57.

[381] **Aksoy vs. Turkey,** Judgement of 18 December 1996, Application No.21987/93, para 113; **Kenaan v. United Kingdom,** Judgement of 3 April 2001, Application No.27229/25, para.138 (non-pecuniary damage for the anguish and distress the victim suffered on account of the conditions in which her son had been detained); **Olsson vs. Sweden,** Judgement of 24 March 1988, Application No.10465/83, para.102; **Selmouni vs. France,** Judgement of 28 July 1999, Application No.25803/94, para. 123, saying that torture is an assault on a person's physical and moral integrity and hence consitutes harm.

[382] See e.g. PTC I, **Situation in the Democratic Republic of the Congo**, Decision on the applications for participation in the proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6 of 17 January 2006, Case No. ICC-01/04, paras. 116 et seq.

[383] See above; see also **Bitti**, **G.** and **G. González Rivas** (2006). The Reparations Provisions for Victims Under the Rome Statute of the International Criminal Court. Redressing Injustice through Mass Claims Processes: Innovative Solutions to Unique Challenges. Oxford**:** 299-322. At page 303.

that, in light of the adoption of the Declaration by consensus at the UN General Assembly and the wide acceptance of its provisions, it should be a reference point for the participation of victims in proceedings before the Court.[384]

In one of its decisions, the ICC itself referred to the Basic Principles, the jurisdiction of the Inter-American and European Court of Human Rights and the 2005 Victim Principles, thereby recognizing emotional suffering as harm.[385] In another case "prejudice moral" was also accepted as harm.[386]

Further indication is given by the victim booklet[387] where it is stated that "it will be up to the judges of the ICC to establish what types of harm will qualify, but they are likely to include not only physical harm to a person's body, but also emotional suffering".[388]

The Defence in one case has pointed that French case law has restricted the recognition of mental harm.[389] However, the merits of having recourse to national where international principles are readily available and applicable seems questionable.

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[384] See Report of the Preparatory Committee on the Establishment of an International Criminal Court, U.N. Doc. A/Conf./83/2 (1998), U.N. Doc. A/Conf.183/2/Add.1 at page 109; http://documents-dds-ny.un.org/doc/UNDOC/GEN/N98/144/11/pdf/N9814411.pdf?OpenElement.

[385] See PTC I, **Situation in the Democratic Republic of the Congo**, Decision on the applications for participation in the proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6 of 17 January 2006, Case No. ICC-01/04, paras. 115 et seq.

[386] See PTC I, **Situation en République Démocratique du Congo,** Decision sur les demandes de participation à la procédure a/0001/06, a/0002/06 et a/0003/06 dans le cadre de l'affaire *Le Procureur c. Thomas Lubanga Dyilo* et de l'enquête en République démocratique du Congo du 31 juillet 2006, Case No. ICC-01/04-177, at page 12.

[387] Although of course not binding.

[388] See victim booklet at page 17; see also page 36 where it is said that "the ICC recognises different types of harm that a victim suffers as a result of crimes that the Court deals with. These crimes can cause physical suffering to a person's body. They can also cause emotional suffering or psychological or mental harm, by which a person's mind is affected because of what she or he has experienced or witnessed."

[389] See Defence, Situation in the Democratic Republic of the Congo in **Prosecutor vs. Thomas Lubanga Dyilo,** Defence submissions regarding the applications for participation in the proceedings of applicants a/0004/06 to a/0052/06 of 4 September 2006, para. 66.

By now, both the Pre-Trial Chambers and the Trial Chamber have concluded that not only physical injury but also economic loss and emotional suffering constitute harm within the meaning of Rule 85.[390] It seems therefore that the ICC will follow the path delineated above.

Of course it also seems conceivable that the ICC's restricted capacities could limit such wide recognition of types of harm in the long term, but so far there is no indication that this could be the case.

With regard to economic loss, Rule 85 (b) protects property and therefore harm to this property. Even if Rule 85 (b) does not protect economic interests in the strict sense[391] it still gives some indication of its application to this issue. Economic loss has been recognized under the 1985 Victims Declaration[392] and under the 2005 Principles[393] and in the jurisprudence of the European Court of Human Rights[394] and the Inter-American Court of Human Rights[395].

The ICC has referred to the Basic Principles, the jurisdiction of the Inter-American and European Court of Human Rights and the 2005 Victim Principles in a case that came before it concerning economic loss and recognized economic loss as harm.[396] Further

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[390] See e.g. PTC I, **Situation in the Democratic Republic oft he Congo**, Decision on the applications for participation in the proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6 in the case *The Prosecutor vs. Thomas Lubanga* Dyilo of 17 January 2006, Case No. ICC-01/04, para.172 and Trial Chamber I Situation in the Democratic Republic of the Congo in **Prosecutor v. Thomas Lubanga Dyilo,** Decision on victim's participation of 18 January 2008, Case No ICC-01/04-01/06, para 92.

[391] See Chapter „natural persons".

[392] Para. 1 G.A. Resolution 40/34, 19 November 1985, fortieth session, UN Doc. A/RES/40/34

[393] Principle 8 of the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights law and Serious Violations of International Humanitarian Law.

[394] **Ayder and Others vs. Turkey**, Judgment of 8 January 2004, Application No. 23656/94, paras. 10 and 141ff.

[395] **El Amparo v. Venezuela**, "Judgement of 14 September 1996, Series C No. 28, paras. 28 to 63.

[396] See PTC I, **Situation in the Democratic Republic of the Congo**, Decision on the applications for participation in the proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6 of 17 January 2006, Case No. ICC-01/04, paras. 115 et seq.

indication is given by the victim booklet[397] where it is stated that "it will be up to the judges of the ICC to establish what types of harm will qualify, but they are likely to include not only physical harm to a person's body, but also material loss" [398], indication is also given by the current jurisdiction.

As for emotional harm it remains to be seen whether the ICC will continue to follow the legal practice as outlined above in the future. However, this seems likely.

As to "substantial impairment of fundamental rights", this term " is fairly unusual in criminal law. It is designed as a catch-all phrase to cover harm that, while not directly harming the victim personally, prevents him or her from participating as a full member of society.[399] The 1985 Victims Declaration and the 2005 Victims Principle both regard substantial impairment of fundamental rights as "harm".[400] As the term can be interpreted very broadly it is doubtful that the ICC will apply it. Besides, the term has not yet been mentioned by the ICC in any of its decisions or in the victim booklet. In any case, the victim declaration has been seen as highly relevant thus far by the ICC so that the Court might as well decide to include substantial impairment after also hearing such recommendations by NGOs.[401]

Thus far it can thus be concluded that the ICC seems to have adopted a wide interpretation of the term "harm", which corresponds in the main with the Victims Declaration. However, for reasons of legal certainty the Court will not be able to avoid

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[397] Although of course not binding.

[398] See victim booklet at page 17; see also page 36 where it is said that "the ICC recognises different types of harm that a victim suffers as a result of crimes that the Court deals with….There could also be material harm, such as where property is damaged or lost as the result of the crime, including your home or other property."

[399] **Joutsen**, **M.** (1987). The Role of the Victim of Crime in European Criminal System: A crossnational study of the role of the victim. Helsinki, Heuni. At page 300.

[400] See Para. 1 1985 Victims Declaration and Principle 8 2005 Victims Principles.

[401] See e.g. (1999). Human Rights Watch Commentary to the third Preparatory Commission Meeting on the International Criminal Court, Human Rights Watch. At page 23.

further elaboration and a more precise determination of the term harm in the long run, even if it does leave itself the possibility to decide on a case-by-case basis.

VI. Direct-indirect

With regard to the question as to whether only direct harm suffered by a person is covered by the definition of Rule 85 (a) thus excluding indirect harm, it is important first of all that the wording of (a) does not differentiate between direct and indirect harm. The text of Rule 85 (b), however, does explicitly restrict its application to direct victims. Hence we may deduce that if it had also been intended to restrict the scope of Rule 85 (a), the text would have done so explicitly as well.

In the context of the Statute it can be seen that Art. 75 provides that reparation orders are provided "to, or in respect of, victims". This has been interpreted as also providing reparation orders to indirect victims.[402] This does not, however, necessarily mean that this applies to Rule 85 and especially not in the context of participation. When Art.75 of the Statute was adopted the drafter did not know Rule 85. Correspondingly some interpret Art. 75 as being a separate Rule that is limited to the case of reparations.[403] Such an approach is only opposed by the fact that Rule 85 intended to create uniform terminology.

During the Preparatory Commissions the topic was controversial. Many spoke against the formulation relating to "direct and indirect" victims. Concerns were raised for instance about the inclusion of the provision that those who intervene to assist victims in distress or to prevent victimization could also be victims.[404] However, no explicit provision in this sense was adopted in Rule 85.

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[402] See e.g. **Donat-Cattin**, **D.** (1999). Art. 75, Reparations to victims. Commentary on the Rome Statute of the International Criminal Court. O. Triffterer. Baden Baden, Nomos Verlagsgesellschaft**:** 965-978, **Triffterer**, **O.** (1999). Commentary on the Rome Statute of the International Criminal Court. Observers´Notes Article by Article. Baden-Baden, Nomos Verlagsgesellschaft. At page 969; **Safferling**, **C. J. M.** (2003). "Das Opfer völkerrechtlicher Verbrechen." Zeitschrift für die gesamte Strafrechtswissenschaft **115**: 352-384. At page 379.

[403] See **Dwertmann, Eva,** The Reparations System of the International Criminal Court, its implementiation, possibilities and limitations, forthcoming.

[404] CICC, Report on 4th session of the Preparatory Commissions, see www.**iccnow.org**.

The former European Commission on Human Rights already defined the term "victim" in 1972 as including not only the direct victim, but also any person who would indirectly suffer prejudice as a result of such violation or who would have a valid personal interest in securing the cessation of such violation.[405]

The 2005 Principles include in their definition of "victims" the "immediate family or dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent their victimization."[406] These are important cases of "indirect victims", but Principles 8 does not include indirect victims generally. A similar approach was chosen by the 1985 Victims Declaration.[407] As already mentioned above, the Victim Declaration has up to now been given much attention by the ICC and the Preparatory Commissions.[408]

With regard to the ECHR, Art. 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms does not provide any direct answer to the question. However, it is settled case-law of the Court that the word "victim" in the context of Art. 34 of the Convention denotes the person directly affected by an act or omission.[409] The only exception to this is in the special case of family members, who are a particular category of indirect victims who are accorded victim status.[410]

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[405] See **X v. Federal Republic of Germany,** App. 4185/95, 35 Eur. Commn. HR., Dec. & Rep. 140, 142 (1972).

[406] Principle 8.

[407] The Victim Declaration does not mention the term "indirectly" but mentions immediate family or dependants and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization as important, which are important examples of the "indirect" victim.

[408] See **Möller**, **C.** (2003). Völkerstrafrecht und Internationaler Strafgerichtshof - kriminologische, straftheoretische und rechtspolitische Aspekte. Münster, LIT Verlag. At page 550.

[409] See **Brumarescu vs. Romania,** judgement of 28 October 1999, Application no. 28342/95, para. 50; **Lüdi v. Switzerland** judgement of 15 June 1992, Series A no. 238, p. 18, para. 34.

[410] See for example **Cakici vs. Turkey,** judgement of 8 July 1998**,** Application no. 23657/94, para. 98 et seq.; **Kurt v. Turkey**, judgement of 25 May 1998, paras. 130 et seq.

As a rule before the ICHR, it is required that the victim is directly affected by a violation. However, in some cases family members have been also recognized as a group of indirect victims.[411]

Finally, increasing numbers of scholars and academics tend to include indirect victims as victims for the purpose of such proceedings.[412]

In an important decision that was intended to "provide the parties and participants with guidelines on all matters related to the participation of victims throughout the proceedings"[413], Trial Chamber I stipulated that people could be direct or indirect victims of a crime within the jurisdiction of the Court.[414] The decision was on this point upheld by the Appeals Chamber which stated that the harm suffered by victims does not necessarily have to be "direct" although it established that the harm must necessarily be "personal harm".[415]

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[411] See for example **Loayza Tamayo vs. Peru,** Judgement of November 27, 1998, Series C, No. 42, para. 92 et seq: in this judgement, the victim's parents, children and siblings were determined to be the "injured party" due to their "moral torment" over the primary victim's suffering; in **Suárez-Rosero vs. Ecuador**, Judgement of November 12, 1997, Series C, No. 44. paras. 53, 67 the immediate victim's daughter and spouse were included as "injured parties; see also **Aloeboetoe et al. vs. Suriname**, Judgement of September 10, 1993, Series C, No. 15, para. 54; **Castillo Páez**, Judgement of November 27, 1998, Series C No. 43, para 54; see also Art. 41.5 Regulations of the Inter-American Court.

[412] See for example **Timm**, **B.** (2001). The Legal Position of Victims in the Rule of Procedure and Evidence. International and National Prosecution of Crimes under International Law. H. Fischer, C. Kreß and S. R. Lüder. Berlin, Berlin Verlag**:** 289-307. At page 289 subseq.; **Heikkilä**, **M.** (2004). International criminal tribunals and victims of crimes. Turku, Institute for Human Rights, Abo Akademi University. At pages 290, 291; **Bottigliero**, **I.** (2004). Redress for Victims of Crimes Under International Law. Leiden/Boston, Martinus Nijhoff Publishers. At page 6; **Bitti**, **G.** and **G. González Rivas** (2006). The Reparations Provisions for Victims Under the Rome Statute of the International Criminal Court. Redressing Injustice through Mass Claims Processes: Innovative Solutions to Unique Challenges. Oxford**:** 299-322. at page 309; differently **Calvo-Goller**, **K. N.** (2006). The Trial Proceedings of the International Criminal Court ICTY and ICTR Precedents. Leiden, Boston, Martinus Nijhoff Publishers. At page 246.

[413] Trial Chamber I, Situation in the Democratic Republic of the Congo in **Prosecutor vs. Thomas Lubanga Dyilo,** Decision on victim's participation of 18 January 2008, Case No ICC-01/04-01/06, para. 93.

[414] Trial Chamber I, Situation in the Democratic Republic of the Congo in **Prosecutor vs. Thomas Lubanga Dyilo,** Decision on victim's participation of 18 January 2008, Case No ICC-01/04-01/06, para. 91.

[415] Appeals Chamber, Situation in the Democratic Republic of the Congo in **Prosecutor vs. Thomas Lubanga Dyilo**, Judgment on the appeals of The Prosecutor and The Defence against Trial Chamber I's

It is not possible to completely rule out the possibility that the Court will in future decide in favour of a more restrictive interpretation, but as shown above, especially by the wording und also in recent case law , the inclusion of indirectly harmed persons as victims seems most probable.[416]

VII. Family members

Another issue is whether family members come within the definition of victims. There are two options as to how family members could be classified as "victims". First, it is conceivable that a family member can claim to have suffered harm of his or her own if the harm caused to the direct victim has indirectly harmed the family member, too. Second, if the direct victim dies as a result of the harm the family member could assert the victim's rights without having suffered harm personally.

With regard to the first possibility, it has to be said that the wording of Rule 85 does not mention the word "family members". In the Preparatory Commissions the possibility of including the word "family members" was discussed in a controversial way in cases where family members would have suffered their own, indirect harm. Suggestions that "family members" would be explicitly covered in the definition were not accepted since it was generally felt that "family members" would need a long and complex definition of its own.[417] This does not mean that family members are excluded from the definition. However, in order to qualify "victims", family members would have to claim that they have suffered either physical harm caused by their indirect suffering or emotional or economic harm.[418] A causal connection between the harm suffered by the victim and the

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Decision on Victims' Participation of 18 January 2008, Case No. ICC-01/04-01/06 OA 9 OA 10, at page 4.

[416] See for instance Trial Chamber I, Situation in the Democratic Republic of the Congo in **Prosecutor v. Thomas Lubanga Dyilo,** Decision on victim's participation of 18 January 2008, Case No ICC-01/04-01/06, para.91 where the Court has already decided in this sense.

[417] See **Fernández de Gurmendi**, **S. A.** (2001). Definition of Victims and General Principles. The International Criminal Court, Elements of Crimes and Rules of Procedure and Evidence. R. S. Lee. Ardsley, New York, Transnational Publishers Inc.**:** 427-434. At page 432.

[418] Thereto see above pages 76 et seq.

indirect harm of the family member would be another precondition to classification as a victim.

With regard to the context of the statute in Art. 75[419], family members are mentioned indirectly and directly in the wording of Art. 79(1) Statute and Regulation 42 of the Trust Fund Regulations. However, as mentioned above, these provisions can be interpreted as making separate provision for indirect victims only for the case of reparations. On the other hand, it can be assumed that it was intended to create a uniform definition of victims for the purposes of the Statute. Thus, if family members were admitted only to reparation proceedings this could lead to inconsistent and confusing rulings.

The 1985 Victims Declaration and the 2005 Victims Principles both mention family members explicitly.[420] Before the ICHR family members of direct victims have received compensation for being victims of moral damage.[421] Before the ECHR family members of direct victims have also been recognised as victims.[422] Furthermore, this view has found support elsewhere in commentators on the field.[423]

The ICC has accepted, if not definitely then in practice, that persons can be "victims" because of the indirect harm suffered through the death of a family member.[424] This could

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[419] "In respect of", note that this is only one possible interpretation, see thereto **Dwertmann, Eva,** The Reparations System of the International Criminal Court, its implementiation, possibilities and limitations, forthcoming.

[420] See Para. 2 Victim Declaraion and Principle 8.

[421] See for example **Godinez Cruz,** Judgement of July 21, 1989, Series C No.5, para. 20; **Loayza Tamayo vs. Peru,** Judgement of November 27, 1998, Series C. No. 42, para. 92 et seq.; **Velasquez Rodriguez,** Judgement of July 21, 1989, Series C, No. 7, para.8 and others.

[422] See for example **Cakici vs. Turkey**, Judgement of 8 July 1998, paras. 98 f.; **Ergi vs. Turkey**, Judgement of 28 July 1998, No. 66/1997/850/1057; **Keenan vs. United Kingdom,** Judgement of 3 April 2001**,** Application no. 27229/95.

[423] See **Henzelin**, **M.**, **V. Heiskanen**, et al. (2006). "Reparations to Victims before the International Criminal Court: Lessons from International Mass Claims Processes." Criminal Law Forum **17**: 317-344. At page 323.

[424]See e.g. PTC I, **Situation in the Democratic Republic of the Congo**, Decision on the applications for participation in the proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6 of 17 January 2006, Case No. ICC-01/04, para. 89.

[424] See above pages 81 et seq.

indicate that the ICC will in future accept family members as participants in proceedings. Another indication as to the ICC's policy can be seen from the victim booklet where it is said that a victim can also be a person who suffers harm as a result of a crime targeted at another person, such as a family member.[425]

But if family members are indeed to be victims themselves then who can be classified as part of the "family"? The ICHR in *Loayza Tamayo vs. Peru* held that the term family members should be understood in a broad sense to include all those persons linked by a close relationships, including the children, parents and the siblings of direct victims.[426] In the *Aloeboetoe* Case[427] the Interamerican Court applied local law and custom to determine the ambit of the term "family". The Court found that the country's family law was not effective in the region and that as a result, multiple wives and children of the victims were to be recognised as forming part of the family. The Human Rights Committee has stated in this context that a communication may be submitted on behalf of the alleged victim by reason of the author's "close family connection".[428] The definition of close family connection would reach beyond the bounds of the nuclear family and would also include situations where the author was for example a cousin[429] or niece/nephew.[430]

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[424] See e.g. See PTC I, **Situation in the Democratic Republic of the Congo**, Decision on the applications for participation in the proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6 of 17 January 2006, Case No. ICC-01/04, paras. 114, 117.

[425] See Victim booklet at page 12.

[426] **Loayza Tamayo vs. Peru,** Judgement of November 27, 1998, Series C, No. 42, para. 92 et seq.

[427] See **Aloeboetoe et al. vs. Suriname**, Judgement of September 10, 1993, Series C, No. 15, para. 58 et seq.; see thereupon also the statements of **Shelton**, **D.** (1994). "The Jurisprudence of the Interamerican Court of Human Rights." American University Journal of International Law and Policy **10**: 333-372. pp. 363 et seq.

[428] See **Shelton**, **D.** (2000). Reparations for victims of international crimes. International Crimes, Peace, and Human Rights: The Role of the International Court. D. Shelton. Ardsley, New York, Transnational Publishers**:** 137-147. At page 186.

[429] **Guillermo Ignacio Dermit Barbato et al. vs. Uruguay,** Communication No. 84/1981, U.N. Doc. CCPR/C/OP/2 at 112 (1990).

[430] **Weisman et al. vs. Uruguay,** Communication No. 8/1977*:* U.N. Doc. CCPR/C/9/D/8/1977.

The question remains, however, whether family members can also become a "victim" *qua* being heirs without having suffered harm themselves? This question might arise most obviously in the case of crimes under international law where it is common that the victims themselves have not survived. There is no rule either in the Statute or in the RPE that provides for such a right. Both pecuniary and non-pecuniary claims survive and automatically pass to the victim's heir or successors before the ICHR[431] and successors only need to show their family relationship.[432] Similarly to the ICHR, the ECHR has granted ownership of victims' right to prosecute to the victim's next-of-kin when the victim was deceased.[433]

It seems that participatory rights will be awarded at the ICC to family members of a deceased person, the family member in this case acts "on behalf of the victim" rather then as a victim him or herself.[434] The Court has to be satisfied by the application that the victim really is deceased and that the person applying on his or her behalf is entitled to do so.[435]

It seems that the ICC will, in certain circumstances, accept the participation of family members as victims or as their representatives of victims.

VIII. Commission of any crime within the Jurisdiction of the Court

Rule 85 determines that the harm has to be the result of "the commission of any crime within the jurisdiction of the court". The jurisdiction of the court is limited to the crimes listed in Art. 5 of the Statute, that is to say, crimes of genocide, crimes against humanity

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[431] See e.g. **Aloeboetoe et al. vs. Suriname**, Judgement of September 10, 1993, Series C., No. 15, Para 54, **Garrido and Baigorria v. Argentina**, Judgement of August 27, 1998, Series C., No. 39, Para. 50; see also Art. 41.5 Regulations of the Inter-American Court; see also **Rombouts**, **H.** and **S. Vandeginste** (2000-2003). "Reparation for Victims of Gross and Systematic Human Rights Violations: The Notion of Victim." Third World Legal Studies: 89-114. at 2.3.3.1.

[432] See e.g. **Velásquez Rodríguez**, Judgement of July 21, 1989, Series C, No. 7, Paras. 13, 54.

[433] See e.g. **Gül vs. Turkey,** Judgement of 14 Dezember 2000, Application no. 22676/93, paras. 4 et subseq.; **Ergi vs. Turkey**, Judgement of 28 July 1998, Application no. 66/1997/850/1057.

[434] See for example victim booklet at page 27.

[435] See victim booklet at page 35.

or war crimes. The temporal jurisdiction of the court is set out in Art. 11 which states that it has jurisdiction only with respect to crimes committed after the entry into force of the Statute. The crime must also meet one of the two alternative conditions described in Art. 12 of the Statute. The exercise of jurisdiction is governed by Art. 13.

The use of the term "commission of crime" also creates the above mentioned conflict with the presumption of innocence.[436] If a Court at any point of the proceedings before the conviction declares that there has been a "commission of a crime" then this infringes the presumption of innocence.

It is difficult to see how the use of the term „allegedly" can be avoided in connection with the term "commission of a crime". Pre-Trial Chamber I also uses the formulation "crime allegedly committed"[437] although the word "allegedly" has deliberately been left out of the wording of Rule 85 following discussions in the Preparatory Commissions.[438]

PTC I also found an answer in applying an evidentiary standard that is adjusted to the particular phase of the proceedings. Respectively in the first decision at the stage of investigation of a situation the Court has applied the standard that there must be "grounds to believe" that the alleged harm was caused by crimes under the jurisdiction of the court.[439] This interpretation lowers the standard of proof for an application to participate thereby facilitating the situation for victims.

The Office of the Prosecutor ("OTP") stated in this regard that by using the "grounds to believe" test the Chamber prejudged the commission of crimes falling within the jurisdiction of the Court and that the decision was detrimental to the fairness of the

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[436] See thereto above at pages 70 et seq.

[437] See e.g. PTC I, **Situation in the Democratic Republic of the Congo**, Decision on the applications for participation in the proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6 of 17 January 2006, Case No. ICC-01/04, para. 89.

[438] See above pages 70 et seq.

[439] See PTC I, **Situation in the Democratic Republic of the Congo**, Decision on the applications for participation in the proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6 of 17 January 2006, Case No. ICC-01/04, paras. 95 et seq.

proceedings.[440] The Chamber responded that the Chamber's findings may be re-examined on the basis of information available later on in the proceedings and that it was therefore not prejudging the issue.[441]

It is submitted here that the danger of prejudging must at least to be taken seriously and in the face of a relatively low standard of proof the danger may be even greater. This can only be avoided if the Court's decision really can be re-examined and if the terminology is also very clear. For it is not only a prejudgement by the Court that can do harm to the accused but also a prejudgment by the media and public.

Another question that arises from the wording of Rule 85 is whether every "victim of a situation"[442] or only "victims of a case"[443] are covered by the definition. The wording of Rule 85 is not clear on this point, it only links the term victim to the commission of a crime within the jurisdiction of the Court, therefore it could be concluded that every victim of a situation is a "victim".

From the overall context it can be seen that some Rules are specifically designed for a point in the proceedings where the identity of the accused is not yet specified – those Rules inevitably refer to "victims of the situation".[444]

It has further been suggested that as the interests of victims are protected in principle, in general, at all stages of the proceedings, the Court might take a broad approach in the sense of defining the notion of victims and their participatory rights in relation to the

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[440] See Prosecutor, **Situation in the Democratic Republic of the Congo,** Prosecution's Application for Leave to Appeal Pre-Trial Chamber I's Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS of 23 January 2006, para. 13.

[441] See PTC I, **Situation in the Democratic Republic of the Congo,** Decision on the Prosecution's application for leave to appeal the Chamber's decision of 17 January 2006 on the applications for participation in the proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6 of 31 March 2006, para. 59.

[442] That is every natural or legal person that has suffered harm as a result of the commission of crimes within the jurisdiction of the Court in a specific territory.

[443] That is only natural or legal persons that have suffered harm as a result of the commission of crimes within the jurisdiction of the Court by identified accused persons or suspects.

[444] See for example Art. 15(3), Rule 50(1) and (3), Rule 92(2) Rule 107(5) and Regulation 86 (6).

territorial and temporal scope of the 'situation'. This position also finds support in various human rights documents, which advocate a broad approach to victims' participatory rights.[445] Indeed, the ICC itself, has decided to apply Art. 68(3) to six "victims of a situation".[446] However, this decision has been hotly contested.[447]

After this first decision it had been said that the decision and the other indications that victims of the situation will be acknowledged should not be misunderstood: this recognition would only apply to the stage of the proceedings where there is no identified accused person.[448] The Chamber had stated that at the case stage, the status of victim would be accorded only to applicants who seemed to meet the definition of victims set out in Rule 85 in relation to the relevant case.[449] A causal link between the harm suffered and the crimes contained in the arrest warrant would then have to be shown.[450]

Almost exactly two years after the decision of January 2006, on 18 January 2008, Trial Chamber I rendered another ''landmark decision'' on the issue of victim participation deciding among others on the above mentioned question.[451]

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[445] **Stahn**, **C.**, **H. Olasolo**, et al. (2006). "Participation of Victims in Pre-Trial Proceedings of the ICC." Journal of International Criminal Justice **4**(1): 219-238. At page 222.

[446] See e.g. PTC I, **Situation in the Democratic Republic of the Congo**, Decision on the applications for participation in the proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6 of 17 January 2006, Case No. ICC-01/04, para. 54.

[447] More thereto see below pages 133 et seq.

[448] See **Olasolo**, **H.** (2005). The Triggering Procedure of the International Criminal Court. Leiden, Boston, Martinus Nijhoff Publishers. At page 109.

[449] See e.g. PTC I, **Situation in the Democratic Republic of the Congo**, Decision on the applications for participation in the proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6 of 17 January 2006, Case No. ICC-01/04, para. 66.

[450] See PTC I, Situation in the Democratic Republic of the Congo in **Prosecutor vs. Thomas Lubanga Dyilo,** Decision on the Applications for participation in the proceedings submitted by VPRS 1 to VPRS 6 in the Case the Prosecutor v. Thomas Lubanga Dyilo of 29 June 2006, Case No. ICC-01/04-01/06-172-tEN, pp. 3 et seq.

[451] Situation in the Democratic Republic of the Congo in **Prosecutor vs. Thomas Lubanga Dyilo,** Decision on victim's participation of 18 January 2008, Case No ICC-01/04-01/06.

Prior to the decision, Trial Chamber I had invited all parties and participants to make submissions on the ‘‘role of victims in the proceedings leading up to, and during, the trial. Based on these submissions and prior pronouncements by the different chambers, the said decision was intended to “provide the parties and participants with guidelines on all matters related to the participation of victims throughout the proceedings”.[452]

In the 18 January decision the Trial Chamber ruled that victims of **any crime** committed in the DRC and within the jurisdiction of the Court could potentially participate in the trial, although the trial itself involves only a single former DRC militia leader, Thomas Lubanga Dyilo (“Lubanga”), who faces charges of child conscription, child enlistment, and use of children in hostilities.[453]

It was held that an applicant would be entitled to “potentially participate” in a case—i.e., obtain an entitlement analogous to the right the Pre Trial Chambers had called the “status of victim”—if he or she was “a victim of any crime falling within the jurisdiction of the Court.”[454] This ruling lowered the standard for granting the “status of victim” vis-à-vis a case, at a minimum, to the standard which until then had been applied to grant the “status of victim” vis-à-vis a situation.

The majority reasoned that Rule 85(a) of the RPE, which defined the term “victim” for the purposes of the Statute and the RPE, provided that “victims” were “natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court.”

It was opined that because there was no further requirement set forth in Rule 85(a) that the harm to the victim must have resulted from the crimes prosecuted in the ICC, no such

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[452] Trial Chamber I, Situation in the Democratic Republic of the Congo in **Prosecutor vs. Thomas Lubanga Dyilo,** Decision on victim’s participation of 18 January 2008, Case No ICC-01/04-01/06, para. 93.

[453] See Trial Chamber I, Situation in the Democratic Republic of the Congo in **Prosecutor v. Thomas Lubanga Dyilo,** Decision on victim’s participation of 18 January 2008, Case No ICC-01/04-01/06, at paras. 94 et seq.

[454] See Trial Chamber I, Situation in the Democratic Republic of the Congo in **Prosecutor v. Thomas Lubanga Dyilo,** Decision on victim’s participation of 18 January 2008, Case No ICC-01/04-01/06, separate and dissenting opinion of Judge René Blattmann, at para. 96.

limitation could lawfully be imposed.[455] The majority also found support for its broad definition of "victim" in Principles 8 and 9 of the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of Human Rights Law and Serious Violations of International Humanitarian Law, adopted by the United Nations General Assembly in 2005.[456]

Writing in dissent, the Honorable René Blattman reasoned primarily that it transgressed "fundamental principles of criminal law, such as the principle of legality, to not link the status of victim and consequent rights of participation to the charges confirmed against the accused." Judge Blattman found it "necessary to state, first and foremost, . . . that victims'participation is not a concession of the Bench, but rather a right accorded to victims by the [Rome] Statute."[457]

Lubanga's defense counsel has then had the opportunity to address the Ruling of Trial Chamber I establishing standards for victim's participation in the Lubanga case.

By order dated February 26, 2008, Trial Chamber I granted the Office of Public Counsel for the Defence ("OPCD") and the OTP leave to appeal the January 18, 2008, decision.[458] Specifically, the Trial Chamber granted leave to appeal the question of "whether the harm alleged by a victim and the concept of "personal interests" under Art. 68 of the Statute must be linked with charges against the accused. The parties also obtained leave to address "whether it is possible for victims participating at trial to lead evidence pertaining

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[455] See Trial Chamber I, Situation in the Democratic Republic of the Congo in **Prosecutor v. Thomas Lubanga Dyilo,** Decision on victim's participation of 18 January 2008, Case No ICC-01/04-01/06, separate and dissenting opinion of Judge René Blattmann, at paras. 98, 99.

[456] Trial Chamber I, Situation in the Democratic Republic of the Congo in **Prosecutor vs. Thomas Lubanga**, Decision Regarding the Timing and Manner of Disclosure and the Date of Trial of 9 November 2007, Case No ICC-01/04-01/06.

[457] See Trial Chamber I, Situation in the Democratic Republic of the Congo in **Prosecutor v. Thomas Lubanga Dyilo,** Decision on victim's participation of 18 January 2008, Case No ICC-01/04-01/06, separate and dissenting opinion of Judge René Blattmann, at paras. 21 et seq.

[458] See Situation in the Democratic Republic of the Congo in **Prosecutor v. Thomas Lubanga Dyilo,** Decision on the Defence and Prosecution Requests for Leave to Appeal the Decision on Victims' Participation of 18 January 2008, Case No ICC-01/04-01/06.

to the guilt or innocence of the accused and to challenge the admissibility or relevance of evidence".[459]

The Appeals Chamber then reversed the decision of the majority of the Trial Chamber that under the Rome Statute framework generally, and Rule 85 of the Rules in particular, the participation of victims is not limited to the Trial Chamber's investigation of the crimes contained in the charges confirmed by the Pre-Trial Chamber. The Appeals Chamber found that for the purposes of participation in trial proceedings, the harm alleged by a victim and the concept of personal interests under Art. 68(3) of the Rome Statute must be linked to the charges confirmed against the accused.[460]

This development shows that the term "commission of any crime" will not be interpreted as broad as expected in the beginning.

IX. Causal link ("as a result of")

The next criterion laid down in Rule 85 is a causal link between the crime falling within the jurisdiction of the Court and the harm suffered. The Statute does not specify the applicable standard of causation.

With regard to causation, in general it has been stated that it is a complex issue in every legal system and the extent of liability for remote events and the consequences of intervening causes may vary considerably from one area of the law to another.[461] In most legal systems, doctrines similar to "proximate cause" were used to define the extent of liability by excluding more remote consequences where there was an uncertain critical

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[459] See Situation in the Democratic Republic of the Congo in **Prosecutor v. Thomas Lubanga Dyilo,** Decision on the Defence and Prosecution Requests for Leave to Appeal the Decision on Victims' Participation of 18 January 2008, Case No ICC-01/04-01/06.

460 Appeals Chamber, Situation in the Democratic Republic of the Congo in Prosecutor v. Thomas Lubanga Dyilo, Judgment on the appeals of The Prosecutor and The Defence against Trial Chamber I's Decision on Victims' Participation of 18 January 2008, Case No. ICC-01/04-01/06 OA 9 OA 10, page 4.

[461] **Shelton**, **D.** (1996). "Righting wrongs: Reparations in the Articles on State Responsibility." American Journal of International Law **96**: 833-856. At page 846.

link, or cumulative uncertainties about causation, making it possible to say that the wrong caused the harm according to the accepted standard of proof.[462]

There is no settled view in general international law on this point. Although international claims commissions have developed extensive jurisprudence on causation, they have failed to come up with a uniform standard.[463]

In applying the concept of causality, the ICC has stated that from Art. 30(2), (3) ("ordinary course of the events") it could be seen that causality was being understood as something more then a mere "scientific causal connection" in the sense of "objectively attributing the act to the perpetrator".[464]

In the context of reparations the establishment of the precise causal link between the crime and the harm has been said to depend on the kind of harm claimed to have been suffered and particularly the form of reparation requested. As mentioned in the context of liability, setting forth a precise standard for causation and methods for the establishment of causation is particularly relevant regarding individual financial reparation awards, typically in the form of compensation.[465] An initial evaluation of the causation in the context of applying the definition of "victim" to application for participation, it can be presumed that the standard required for causation will not be the same standard as, for example, for financial reparations.[466] In fact at that point when not all details are clear the Court will instead have to apply a practical solution.

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[462] **Shelton**, **D.** (2005). Remedies in International Human Rights Law. Oxford, Oxford University Press. At page 231.

[463] For discussion see e.g. **Wühler**, **N.** (1995). Causation and Directness of Loss as Elements of Compensability Before the United Nations Compensation Commission. The United Nations Compensation Commission. R. B. Lillich. Irvington, New York, Transnational Publishers**:** 188-207.

[464] **Ambos**, **K.** (2006). Internationales Strafrecht. München, C. H. Beck Verlag. At page 125; **Satzger**, **H.** (2005). Internationales und Europäisches Strafrecht. Baden-Baden, Nomos. At page 178; **Werle**, **G.** (2005). Principles of International Criminal Law. The Hague, TMC Asser Press. At page 98.

[465] See **Shelton**, **D.** (2005). Remedies in International Human Rights Law. Oxford, Oxford University Press. Pp 125 et seq.

[466] As for those it has been suggested that considering the high number of potential claimants it was likely, and probably advisable, that the Court will adopt clear and relatively strict threshold criteria, see **Henzelin**, **M.**, **V. Heiskanen**, et al. (2006). "Reparations to Victims before the International Criminal

Accordingly, it has been stated by Trial Chamber I that it was sufficient to prove that „the spatial and temporal circumstances surrounding the appearance of the harm and the occurrence of the incident seem to overlap, or at least to be compatible and not clearly inconsistent.[467]

A sound re-examination of the causal link will most probably be indispensable when deciding reparation issues.

It is interesting that so far, a greater number of victim applications have been denied owing to the lack of causality between the harm suffered by the victims and the crime alleged. The failure of those applications under the heading of "causality" was, however, not due to complex causation theories but the rather simple fact that in most cases no connection at all could be established in relation to the respective accused.

In its decision of 17 January 2006, PTC I held that the harm sustained by the victim must have resulted from those crimes that form the basis of the charges. In declining to specify, the Chamber left open whether the applicable standard of causation was for instance directness, proximate cause, foreseeability, or some other standard.[468]

With regard to the conditions necessary to establish a causal link before the ICC, it has been said, that the harm suffered has to be "directly linked" to the crimes contained in the arrest warrant[469] or that there has to be a "relevant and close link"[470] or a "genuine and close link"[471].

Court: Lessons from International Mass Claims Processes." Criminal Law Forum **17**: 317-344. At page 325.

[467] See Situation in Uganda in **Prosecutor vs. Joseph Kony, Vincent Otti, Okot Odhiambo, Dominic Ongwen**, Decision of Pre Trial Chamber II on victims' applications for participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06 of 10 August 2007, Case No.ICC-02/04-01/05, para. 14.

[468] Compare PTC I, **Situation in the Democratic Republic of the Congo**, Decision on the applications for participation in the proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6 of 17 January 2006, Case No. ICC-01/04.

[469] See PTC I, Situation in the Democratic Republic of the Congo in **Prosecutor vs. Thomas Lubanga Dyilo,** Decision on applications for participation in proceedings a/0004/06 to a/0009/06, a/0016/06, a/0063/06, a/0071/06 to a/0060/06 and a/0105/06 in the case *The Prosecutor vs. Thomas Lubanga* Dyilo of 20 October 2006, Case No. ICC-01/04-01/06-601-tEN, page 9; see also PTC I, Situation in the

In the victim booklet it is indicated that in order to show the link between what happened to the applicant and the situation or case the Court is dealing with, information should be given about the individuals who may be responsible, either "directly or because of their command or control over the individual who committed the alleged crime(s)".[472]

Ultimately the determination of relevant proximity will, as in national jurisdictions, most probably be left very much to the circumstances of each individual case. There is no such elaborate jurisprudence in international law yet, as it already exists in many countries. This will cause legal uncertainty, at least for a while.

X. Individual – collective

Rule 85 does not differentiate between collective and individual victims unlike the Victims Declaration, where collective victims are expressly listed as category of victims[473] or the 2005 Victims Principles[474] which does likewise.

In the context of the ICC earlier drafts at the Preparatory Commissions had expressly described victims as "persons who, individually or collectively, have suffered harm". Some delegations expressed a desire to clarify the term "collectively". However, no

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Democratic Republic of the Congo in **Prosecutor v. Thomas Lubanga Dyilo,** Decision on the Applications for participation in the proceedings submitted by VPRS 1 to VPRS 6 in the Case the Prosecutor v. Thomas Lubanga Dyilo of 29 June 2006, Case No. ICC-01/04-01/06-172-tEN, at page 8.

[470] See PTC I, Situation in the Democratic Republic of the Congo in **Prosecutor vs. Thomas Lubanga Dyilo,** Décision sur les demandes de participation à la procedure a/0001/06, a/0002/06 et a/0003/06 dans le cadre de l'affaire le Procureur contre Thomas Lubanga Dyilo et de l`enquête en République démocratique du Congo du 31 juillet 2006, Case No. ICC-01/04-177 01-08-2006, at page 4.

471 See PTC I, Situation in the Democratic Republic of the Congo in Prosecutor v. Thomas Lubanga Dyilo, Decision on the Applications for Participation in the Proceedings of a/0001/06, a/0002/06 and a/0003/06 in the case of the Prosecutor v. Thomas Lubanga Dyilo and of the investigation in the Democratic Republic of the Congo of 28 July 2006, Case No. ICC-01/04-01/06-228-tEN, at page 3.

[472] See victim booklet at page 36.

[473] Para. 1 reads :""Victims" means persons who, individually or collectively, have suffered harm, including …"

[474] See Principle 8.

consensus could be reached on the issue, therefore the term was simply not included into the text.[475]

The wording of Rule 85 now speaks of natural persons, using the plural. But a plural of natural persons is not necessarily synonymous with a "collectivity".

Another indication comes from the context: Rule 90(2) provides for the possibility that the Chamber could request the "victims or particular groups of victims" who are applying to participate in the proceedings to choose a common legal representative. Furthermore, the Court can award reparations on a collective basis were it considers it appropriate.[476] It could therefore be argued that the idea of collectivity is inherent in the Rules themselves[477] but it could also be said that the rules only provide for particular solutions for participation and reparation respectively and that they are not of general application.[478] As to the question of whether the terms "group" and "collectivity" are used in a synonymously, it could be argued that they are different to the extent that while a collective may be defined as "groups or groupings of individuals linked by special bonds, considerations, factors or circumstances"[479] groups can be but do not necessarily have to share such characteristics. In general, however, both terms are used in the same way.[480]

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[475] See **Fernández de Gurmendi**, **S. A.** (2001). Definition of Victims and General Principles. The International Criminal Court, Elements of Crimes and Rules of Procedure and Evidence. R. S. Lee. Ardsley, New York, Transnational Publishers Inc.**:** 427-434. At page 431.

[476] See Rule 97(1) RPE.

[477] Similarly **Timm**, **B.** (2001). The Legal Position of Victims in the Rule of Procedure and Evidence. International and National Prosecution of Crimes under International Law. H. Fischer, C. Kreß and S. R. Lüder. Berlin, Berlin Verlag**:** 289-307. Pp 303 et seq.

[478] Similarly **Heikkilä**, **M.** (2004). International criminal tribunals and victims of crimes. Turku, Institute for Human Rights, Abo Akademi University. At page 18.

[479] See **Bassiouni**, **M. C.** (1988). International Protection of Victims. Toulouse, Edition Eres. At page 183 who however uses these characteristics to make a distinction between individual and collective victims and uses "group" and "collectivity" in a synonymous way.

[480] See for instance **Rombouts**, **H.** and **S. Vandeginste** (2000-2003). "Reparation for Victims of Gross and Systematic Human Rights Violations: The Notion of Victim." Third World Legal Studies: 89-114. at page 99 stating that a group of individual persons is more than the sum of individuals and groups have their own characteristics that are not identical with the characteristics of the individuals composing the group.

Under the ECHR, groups of individuals can claim to be the victim of a violation of the Convention.[481] Under the Inter-American Convention, "[a]ny person or group of persons may lodge petitions with the Commission containing denunciations or complaints of violation of this Convention by a State Party."[482]

These findings and the fact that the ICC so far seems to follow the guidance of the Victim Declaration indicate that victims will also be allowed to participate in proceedings "collectively" or as a "group".

Nonetheless, up to now, the ICC has only provided participation forms for individuals and institutions and not for groups of individuals or collectives. This could be interpreted as meaning that even if victims participate in a group they still can only do so if every single person has submitted an individual application.[483] So far, the ICC does not seem to have considered the possibility that very few persons apply for a group of persons of whom the ICC does not have exact notice. This could also be problematic as regards the rights of the accused.[484] Still, it should not be forgotten, that the participation of a group of victims automatically may have a symbolic effect on a group or collectivity of persons of whom not all are participating. This may even be necessary and intended in order to achieve the ICC's goals.

In opposition to the argument that individuals do fall under the definition of Rule 85 as collectives, it has also been argued that only collectives are covered by the definition: As victims in international criminal law were not individuals but individuals bound by a collective characteristic, the definition should perceive them as such. Participation would then, for instance, only be allowed by common legal representation. The participation of

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[481] Arts. 34 and 41 European Convention.

[482] Art. 44.

[483] See similarly **Boyle**, **D.** (2006). "The Rights of Victims." Journal of International Criminal Justice **4**(1): 307-313. At page 310 who states that individual participation is the rule before the ICC; victim participation will occur primarily through various forms of joint legal representation.

[484] Similarly as anonymous participation this could violate the right of the accused to know his accusers, thereto see below Chapter participation in the Trial.

individuals would risk reducing the international criminal trial to a simple criminal trial. [485]

This reasoning clearly contradicts the practice before the ICC which allows for the participation of individuals as can be seen, for instance, by the nature of participation forms. It may be that the participation of groups will become standard for practical reasons in the long term. Still it should also be possible to let individuals participate. It is rather a question of what better serves the goals of the proceedings, for instance with regard to collective reconciliation. Indeed it seems that the ICC has thus far tended to let many victims participate which may ultimately lead to group participation. Still, if for instance only one person applies, it should be possible to let this person be defined as a "victim".

XI. Conclusion

In conclusion, it has been shown that the ICC has tended to give a wide interpretation of the definition of victim which seems to be in line with the Victim Declaration. Such an approach on the one hand serves the interests of victims as it facilitates their participation in the proceedings or their receipt of reparations. However, it should not be forgotten that such wide interpretation could also give rise to high expectations that must be managed in a responsible way. The author does, however, not advise to restrict the definition. Instead it is submitted that the necessary restrictions that arise from the admittance of a wide group of victims[486] will have to be disclosed and explored.

D. Conclusion

In conclusion we may summarize that victim participation before the ICC will take part with the background of "classic" purposes of punishment as retribution and deterrence

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[485] **Safferling**, **C. J. M.** (2003). "Das Opfer völkerrechtlicher Verbrechen." Zeitschrift für die gesamte Strafrechtswissenschaft **115**: 352-384. At page 382.

[486] The ICC must ensure that it is not overwhelmed, and that the efficiency and integrity of its proceedings must not be hampered by victim participation, which can for instnace be secured by a flexible mechanism for victim participation in the Rules that may lead to a restriction on the number of applications admitted.

playing an important part but also with other purposes of punishment such as norm stabilization, reconciliation and maybe to a certain extent also truth finding and doing justice for victims becoming more important. It has been observed, that in its punishment purposes and through victims' participatory rights, the ICC envisages consideration of victims and their interests but only in a manner ancillary to its primary task which consists of the protection and assertion of collective interests.

The victim definition chosen by the ICC on the first view gives room to a wide interpretation.

These findings will have to be taken into account in interpreting the ICC's provisions on participation.

CHAPTER 4 - The ICC's provisions on participation

A. Introduction

This section will examine in detail the ICC' s provisions on victim participation with regard to the question of how far-reaching the provisions are and to what extent the ICC implements its objectives. The central provision for victim participation is to be found in Art. 68 (3) and is supplemented by the RPE and the Regulations of the Court.

B. Participation in the preliminary examination stage

Early participation in the proceedings is essential to be able to influence the outcome of the proceedings effectively. The extent of participatory rights at this stage has been debated at many points.

I. Outreach as a precondition for participation

The participation of victims especially in the early stages of the proceedings, for example, by providing information, requires that victims know that investigative activities are intended in their countries and that they have the chance to provide information or even that they are aware of the existence of an International Criminal Court. Furthermore, in

order to be able to later on participate in the proceedings, victims must be aware of this possibility and should also know that early communication with the Court can have influence on whether they are subsequently notified of proceedings or not. Victims must also understand what the Court cannot do in terms of the limits of its mandate.[487]

There are no distinct provisions on outreach but from the experiences of the ICTs and the Special Court for Sierra Leone it is very clear that effective and early outreach is absolutely essential. The ICTY's Outreach only began its work in late 1999, six years after the tribunal itself was established. Consequently it is no wonder that by 1999 there was a perceived gap between international justice and its beneficiaries, the victims of the conflict. It has been said that many feel that the International Tribunal was remote and disconnected from the population and that there was little information available about it.[488] Government officials, international and local organizations and senior tribunal officials have criticized the damage caused by the lack of early outreach. Bosnian NGOs said, "[t]he Hague is something distant that is not understood at all."[489] Damaging to the ICTY's credibility was the fact that most local organizations had to rely on the media as their primary source of information.

Such negative views about a Court can be exploited by authorities that do not recognize or cooperate with the International Tribunal, thereby damaging efforts to foster reconciliation and impeding the work of the OTP. These factor may therefore endanger the aims, credibility and ultimately the success of a Court.

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[487] Victims Right Working Group. Victim Participation at the International Criminal Court Summary of Issues and Recommendations, Victims Right Working Group (2003). At page 3.

[488] **Human Rights Watch**, Human Rights Watch Commentary to the third Preparatory Commission Meeting on the International Criminal Court, Human Rights Watch (1999). See also UN General Assembly, Fifty-Fourth session, "Report of the Expert Group to Conduct a Review of the Effective Operation and Functioning on the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda," A/54/634, November 22, 1999, http://documents-dds-ny.un.org/doc/UNDOC/GEN/N00/230/32/img/N0023032.pdf?OpenElement.

[489] **Cibelli**, **K.** and **T. Guberek** (2000). Justice Unknown, Justice Unsatisfied? Bosnian NGOs Speak About the International Criminal Tribunal for the Former Yugoslavia, Education and Public Inquiry and International Citizenship at Tufts University. http://www.epiic.com/class/justicereport.pdf. At page 14.

As a result, wide dissemination of information about the Court's work and the options for victims are essential for the ICC in order to ensure that all victims who wish to participate can really do so. It has been recommended that the outreach or notice must be done in an effective way that will reach all victims regardless of literacy, resources or social standing. For example, it should be conveyed orally and by radio, as well as in print and television media, as appropriate by the social circumstances of the particular country or communities in question. International courts and tribunals, including international claims commissions, often rely on the internet and other electronic media to disseminate information. Even though these are necessary and important instruments, they are unlikely to be sufficient in most cases to conduct an information campaign. Victims do not always have access to the internet, Darfur being a case in point. The Court should develop strategies for dealing with information campaigns in such situations, keeping in mind the number of potential partners who can assist, including local authorities and international organizations.[490]

Public transparency and credibility can and should be achieved. If the goals of the ICC are, among others, to promote reconciliation and to achieve norm stabilization it should also support these goals also in its outreach work. Outreach is all the more necessary because the ICC mostly holds trials far away from the scene of the alleged crimes and applies law with which most people in the communities affected by the crimes are unfamiliar. Outreach work should thus be listed as one of the central functions of the Registry.[491] The ICC cannot simply rely on the media to do public outreach on its behalf. Important as independent media may be, some reporting may still be susceptible to polarization and misrepresentation. Thus, original information is necessary to counter perceptions of the Court's bias and illegitimacy, which are bound to be fanned by the

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[490] Compare **Henzelin**, **M.**, **V. Heiskanen**, et al. (2006). "Reparations to Victims before the International Criminal Court: Lessons from International Mass Claims Processes." Criminal Law Forum **17**: 317-344. At page 327.

[491] In Art. 43(1) of the Statute it is said that the Registry shall be responsible for the non-judicial aspects of the administration and servicing of the Court; Rule 13 RPE further states that "without prejudice to the authority of the OTP under the Statute to receive, obtain and provide information and to establish channels of communication for this purpose the Registrar shall serve as the channel of communication of the Court."

media controlled or supported by those who are targets of investigations.[492] Nor can the ICC rely on NGOs to carry out the outreach function. While NGOs can help in various facets of outreach and dissemination, they cannot speak for the Court and NGOs are often also tied by limited financial resources.

It seems that the ICC has had problems establishing an effective outreach strategy for a number of reasons, including insufficient funding.[493] It has been said that the initial failure of the Court to establish an effective outreach programme already had a significant adverse impact in Uganda and the DRC.[494]

The financial affairs of the ICC are also of fundamental importance[495] to the outreach programme.

In 2006 the budget for outreach programmes was cut even further from € 1.75 million to € 1.4 million and raised in 2007 to € 2.7 million.[496] The increase in funding is certainly to be welcomed, however, it remains to be seen whether it will prove sufficient.[497]

As another important point in outreach work must be mentioned – even if it seems obvious – that information material has to be provided in the languages spoken by the people concerned. According to an informal statement by a staff member of the ICC the

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[492] **Coliver**, **S.** (2000). The contribution of the International Criminal Tribunal for the Former Yugoslavia to reconciliation in Bosnia and Herzegovina. International Crimes, Peace, and Human Rights: The Role of the International Court. D. Shelton. Ardsley, New York, Transnational Publishers**:** 19-31. At page 28.

[493] See for 2005: **O'Donohue**, **J.** (2005). "The 2005 Budget of the International Criminal Court: Contingency, Insufficient Funding in Key Areas and the Recurring Question of the Independence of the Prosecutor." Leiden Journal of International Law **18**(3): 591-603. At page 601.

[494] Ibid. at page 602.

[495] **Ingadottir**, **T.** (2003). The International Criminal Court: Recommendations on Policy and Practice. Financing, Victims, Judges, and Immunities. Ardsley, New York, Transnational Publishers. At page 100.

[496] See **Boyle**, **K.** (2006). ICC Outreach Budget Gets Big Boost. http://iwpr.net/?p=tri&s=f&o=326204&apc_state=henptri.

[497] For more details see also The Budget and Finance Team of the Coalition for the International Criminal Court (CICC) Submission to the Seventh Session of the Committee on Budget and Finance on 9 – 13 October 2006, Comments on the Proposed Programme Budget for 2007 of the International Criminal Court and other matters, 6 October, 2006 at http://www.iccnow.org/documents/Commentary_on_2007_Budget.pdf at page 9.

forms " may be translated into other languages as and when the Court has the capacity to receive completed applications in those languages." The VPRS recently made the explanatory booklet available on the webpage in a language other than the official court languages[498], namely Arabic.

For a comprehensive outreach programme, the Court will, over time, have to invest more in translation, especially for field work.

As has been pointed out, with the increased resources allocated by the Assembly, the Court's uutreach has recently achieved significant progress, including enhanced coverage, an increased number of activities, the development of a system to assess its impact, the improvement of a system to assess its impact and of its institutional framework, through the establishment of the Outreach Unit.[499]

The ICC's Outreach Report for 2007 indeed shows that outreach activities have increased but does not give any details in how this outreach work is relevant for the topic of victim participation.

As a whole, the outreach work will, despite initial achievements have to be developed in many respects if victims are to be given a real chance to participate. As noted above, a top priority must be the establishment of a functioning outreach program, even if the difficulties facing it will be even bigger than in the case of the ICTs.[500]

II. Initiation of the proceedings

The proceedings before the ICC are initiated by the prosecutor.[501] The Statute provides for three different ways for investigations to be initiated: States can refer a situation to the

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[498] Which according to Art. 50(2) are French and English.

[499] See ICC, Public Information and Documentation Section/Outreach Unit, Outreach Report 2007, http://www.icc-cpi.int/pressrelease_details&id=308.html at page 7.

[500] See **McDonald**, **A.** (2002). The Role of Victims and Witnesses in International Criminal Trials. Treaty Enforcement and International Cooperation in Criminal Matters with special reference to the Chemical Weapons Convention. R. Yepes-Enriques and L. Tabassi. The Hague, T.M.C. Asser Press**:** 257-276. At page 276.

[501] See Arts. 13, 14, 15.

prosecutor[502] as well as the Security Council[503] and according to Art. 15(1) the Prosecutor may initiate investigations *proprio motu* on the basis of information on crimes within the jurisdiction of the Court.

It is not possible for victims to initiate investigations directly in order to ensure that investigations will take place.[504] They can solely provide information[505] to the Office of the Prosecutor ("OTP").

1. Situation Referral by the SC or States

In the case of a referral of a situation by the Security Council or a State, according to Art. 53(1) the prosecutor must evaluate the information received including submissions from victims. Subsequently the prosecutor decides whether to initiate proceedings or not, taking into account the criteria laid down in Art. 53(1).[506] A positive decision to investigate is not subject to review.[507]

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[502] Art. 13(a), 14(1), 18, 53(1).

[503] Art. 13(b), 53(1).

[504] See also **Scomparin**, **L.** (2005). Il ruolo della vittima nella giurisdizione penale internazionale: alla ricerca di una possibile mediazione fra modelli processuali. Problemi Attuali Della Giustizia Penale Internazionale. A. Cassese, M. Chiavario and G. De Francesco. Torino, Giappichelli Editore**:** 365-398. At page 358; see also **Mekjian**, **G. J.** and **M. C. Varughese** (2005). "Hearing the victim's voice: analysis of victims' advocate participation in the trial proceeding of the International Criminal Court." Pace International Law Review **17**: 1-46. at page 19 who states that notwithstanding the victims' comprehensive right to participation and reparation within the Rome Statute and the Rules, a victim does not have complete autonomy to make decisions regarding the initiation of criminal investigation or how the investigation should proceed before trial; see also **Bottigliero**, **I.** (2004). Redress for Victims of Crimes Under International Law. Leiden/Boston, Martinus Nijhoff Publishers. At page 217.

[505] Neither in Art. 15 nor in Art. 53 it is specified who may provide information. From this it can be concluded that everybody may provide information, see also **Mekhemar**, **L.** (2001). The Status of the Individual in the Statute of the INternational Criminal Court. The Rome Statute of the International Criminal Court

A Challenge to Impunity. M. Politi and G. Nesi. Aldershot, Dartmouth Publishing Company Limited**:** 123-130. At page 125.

[506] See Rule 48; one of the criteria according to Art. 53(1)(c) is the gravity of the crimes and the interests of victims.

[507] **Ambos**, **K.** (2006). Internationales Strafrecht. München, C. H. Beck Verlag. At page 268.

If the OTP decides to reject the activation request first States or the Security Council can ask the PTC to review this decision under Art. 53(3)(a). Second, under Art. 51(3)(b) the PTC may review the OTP's decision on its own initiative if the decision was based solely on (1)(c) or (2)(c). If reviewed, the decision of the Prosecutor shall be effective only if confirmed[508] by the Pre-Trial Chamber. When the Pre-Trial Chamber does not affirm the decision by the Prosecutor, he or she shall proceed with the investigation.[509]

At first glance, there is no way for a victim to initiate the review of a decision of the Prosecutor not to start or proceed with the proceedings.

Of course, once the victim is informed of the decision not to investigate[510] he or she may present additional information. This, admittedly, does not exert pressure in the same way as a review.

Friman argues that the existence of a right to request such a review which is not explicitly provided for in Art. 53, could be based on the provisions on victims' participation in Art. 68.[511]

It has also been said that the right of victims to obtain a review of a Prosecutor's decision not to prosecute a case is implicit in the idea of access to justice.[512] Indeed, the right to

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[508] According to Rule 110, para. 1 a decision by the Pre-Trial Chamber to confirm or not to confirm a decision taken by the Prosecutor , must be concurred in by a majority of its judges and shall contain reasons. It shall be communicated to all those who participated in the review.

[509] See Rule 110(2).

[510] See Rule 92(2) that provides for notification of victims that have "communicated" with the court for which providing information should be sufficient.

[511] **Friman**, **H.** (2001). Investigation and Prosecution. The International Criminal Court Elements of Crimes and Rules of Procedure and Evidence. R. S. Lee. Ardsley, New York, Transnational Publishers**:** 493-538. At page 498.

[512] See **UNODCCP** (1999). Handbook on Justice for Victims, on the Use and Application of the Declaration of Basic Pronciples of Justice for Victims of Crime and Abuse of Power. New York, Center for International Crime Prevention. At page 39; see also **Redress,** Ensuring the effective participation before the International Criminal Court, Comments and Recommendations regarding legal representation for victims, London (1999).; compare also **Reporters without borders**, Victims' Guide to the International Criminal Court (2003). At page 61.

access from the Victims' Declaration has been interpreted by States as requiring them to accord victims a review mechanism for challenging state decisions in investigations and trials.[513] Some states have implemented legal procedures to safeguard the rights of victims to review decisions that adversely affect their interest in prosecutions, such as when the state has decided there is no public interest in prosecuting a suspect or that there is insufficient evidence to do so.[514] A right to ask for a review by a competent authority of a decision not to prosecute is also contained in the Council of Europe's Recommendation No. R (85)11.[515]

However, such a review mechanism as provided for instance in the German system mainly arises from the principle of mandatory prosecution. There is no absolute duty to prosecute before the ICC.[516] Indeed, it seems that the precedent of Nuremberg established the general principle that there is a duty to prosecute certain grave crimes. It has been said that a person's right to justice is a universally accepted norm that is embodied in several internationally binding provisions.[517] However, the Human Rights Committee has

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[513] See **Aldana-Pindell**, **R.** (2004). "An Emerging Universality of the Justiciable Victims' Rights to the Criminal Process to Curtail Impunity for State-Sponsored Crimes." Human Rights Quarterly **26**: 605-686. At page 656.

[514] See for instance § 172 of the German Code of Criminal Procedure ("Klageerzwingungsverfahren") where "the victim may petition first a superior of the prosecutor and then, should this not lead to the desired result, may turn directly to the Court; in France, victims have a right to appeal directly to the court. If the court decides on the motion of the victim that the case should be prosecuted, the prosecutor is obliged to proceed.

[515] See Council of Europe Recommendation No. R (85)11 on the 'Position of the Victim in the Framework of Criminal Law and Procedure', under recommendation B.7; http://polis.osce.org/library/f/2669/468/CoE-FRA-RPT-2669-EN-Recommendation%20No.%20R(85)%2011.pdf

[516] The Prosecution has already clearly stated in reply to applicants' assertion that they enjoyed a right for an investigation to be carried out if crimes within the jurisdiction of the Court and in violation of their fundamental rights had been committed," and that a right "to an effective remedy implied a right to be involved in investigations and prosecutions" that while there was an obligation on States to provide such an effective remedy, the Court was not designed for the prosecution of every person responsible for every crime that falls within its jurisdiction (see for example Articles 17 (1) (d) and 53 (2) (c)). See Prosecution, **Situation in the Democratic Republic of the Congo**, Prosecutions Reply on the Applications For participation 15 August 2005, Case No. ICC-01/04-84-Conf, para. 37; if the Chamber will take the same view, will have to be awaited.

[517] **Mekjian**, **G. J.** and **M. C. Varughese** (2005). "Hearing the victim's voice: analysis of victims' advocate participation in the trial proceeding of the International Criminal Court." Pace International Law Review **17**: 1-46. pp 8 et seq; **Robinson**, **D.** (2003). "Serving the Interests of Justice: Amnesties, Truth

repeatedly held that the "right to a remedy" from Art. 2(3) ICCPR[518] does not mean that private individuals have a right to demand that the State criminally prosecute another person.[519] Even if such an obligation to prosecute grave crimes was accepted it is important to note that it would only exist as in relation to States but not in relation to the ICC. It is not the purpose of the ICC nor does it have the capacity to prosecute all grave crimes. This is apparent from Art. 1 of the Rome Statute where it is established that the jurisdiction of the ICC is complementary to national jurisdictions which means that the ICC will only investigate in cases that have not been brought before national courts. Still, this does not mean that the ICC will prosecute all crimes that are not being prosecuted by States. The duty to prosecute remains with the States – the ICC does not have the capacity to prosecute all grave crimes even if it wanted to do so. It may be assumed that like the ICTs the ICC will focus on prosecuting persons who had leading positions.[520]

If victims do not therefore have a "right to a trial", that is an autonomous activation right, it is a least consistent that they also have no right to review. Such a right may be desirable but seems to be beyond the capacity of the ICC for one and not to correspond with the intention to give wide discretion to the Prosecutor.

Still, prosecutorial decisions are not subject to absolute discretion. As noted before, prosecutorial decisions not to investigate are subject to review by States if they have referred the case to the OTP and in cases where the gravity of the crime is in question also

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Commissions and the International Criminal Court." European Journal of International Law **14**(3): 481-505. At page 490.

[518] Saying that "each State Party to the present Covenant undertakes: (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity; (b) to ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the state, and to develop the pissbilities of judicial remedy; (c) to ensure that the competent authorities shall enforce such remedies when granted."

[519] The Committee nevertheless considers that the State party has a duty to investigate thoroughly alleged violations of human rights, particularly enforced disappearances and violations of the right to life, and to criminally prosecute, try and punish those deemed responsible for such violations." See Human Rights Committee, last in **Arhuarcos vs. Colombia**, Comm. No. 612/1995.

[520] See also **Heikkilä**, **M.** (2004). International criminal tribunals and victims of crimes. Turku, Institute for Human Rights, Abo Akademi University. At page 60.

subject to review by the court; the Prosecutor is subjected to a significant degree of oversight by the Pre-Trial Chamber.[521]

However, there are limited rights to participate in the review decision of other parties to the proceedings. Rule 107 (5) RPE grants victims a right to participate in review proceedings whenever issues of admissibility are raised.[522] Rule 107 RPE refers to Rule 59 for the determination of the modalities of victims thus allowing victims only to make representations in writing.[523] This limited right to participate does not require a formal application as under Art. 68(3).

Another possibility to participate in review proceedings arises from Art. 68 Statute.[524] However, the persons who may participate in this way may be limited through the notification about the fact that a review is happening. Only those victims that have already communicated with the Court in respect of the situation or case in question are notified of such reviews.[525] Minimal participatory rights in the review proceedings under Article 53 may be inferred from Rule 93.[526]

If the review is unsuccessful, the Security Council or State Party may appeal the decision under Art. 82(1)(a) and Rule 154 RPE. The victim does not have this option, not being a "party" to the proceedings.[527] However it might be possible for victims to participate in

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[521] See similarly **Robinson**, **D.** (2003). "Serving the Interests of Justice: Amnesties, Truth Commissions and the International Criminal Court." European Journal of International Law **14**(3): 481-505. At page 487.

[522] See **Olasolo**, **H.** (2005). The Triggering Procedure of the International Criminal Court. Leiden Boston, Martinus Nijhoff Publishers. At Page 111.

[523] Similarly **Stahn**, **C.**, **H. Olasolo**, et al. (2006). "Participation of Victims in Pre-Trial Proceedings of the ICC." Journal of International Criminal Justice **4**(1): 219-238. At page 234.

[524] See for example **Beigbeder**, **Y.** (2002). Judging Criminal Leaders. The slow erosion of impunity. The Hague/Londond/New York, Martinus Nijhoff Publishers. Who states at page 132 that "appropriate stages of proceedings" in the sense of Art. 68 encompass inter alia review hearings.

[525] See Rule 92(2).

[526] See Rules 93,107, 109.

[527] The Preparatory Commission rejected a proposal from the French delegation aimed at granting victims of the situation the procedural status of party strictu sensu in the triggering procedure on the initiative of the OTP, see Proposal concerning Jurisdiction, admissibility and Applicable Law: Submitted by France, UN Doc. PCNICC/1999/WGRPE/DP.43, 23 November 1999, rules 2.9, 2.10 and 2.11.

the appellate procedure. Jorda/de Hemptienne have stated that the victim has no right of appeal and cannot, on that basis, present his or her arguments against the accused to the Appeals Chamber.[528]

However, it has been proposed, that such a right to participate could derive from Rules 155, 156 if applicable.[529] Both Rules 155 and 156 provide for a right of information „to all parties who participated in the proceedings".[530] The text thus does not speak only of „parties" but rather of the "parties who participated" which could be understood to include not only parties *strictu sensu* but also those participating, such as for example victims. Such a view is supported by the wording of the French version of the RPE where the word "parties" is not mentioned. There it is said that *"…tous ceux qui ont participé à la prodécure…"* are to be informed.[531] A precondition to information would then be to have participated beforehand, while it is not clear if for instance the limited participation in the review proceedings is sufficient or only participation in the sense of Art. 68.

If now a right to information according to Rule 156 exists this could indicate that participation in the appellate proceedings was intended.

Rule 156 itself does not explicitly provide for such participation but participation could be provided for by Art. 68. Art. 68 is applicable to "all parts of the proceedings"[532], including, apparently, the appellate proceedings.[533] Furthermore in Rule 149 it is provided

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[528] See **Jorda**, **C.** and **J. de Hemptienne** (2002). The Status and Role of the Victim. The Rome Statute of the International Criminal Court, A Commentary. A. Cassese, P. Gaeta and J. R. W. D. Jones. Oxford, Oxford University Press. **2:** 1387-1419. At page 1406.

[529] See **Olasolo**, **H.** (2005). The Triggering Procedure of the International Criminal Court. Leiden Boston, Martinus Nijhoff Publishers. At page 115.

[530] See Rule 156(2).

[531] See French Version of the RPE on http://www.un.org/law/icc/asp/1stsession/report/french/part_ii_a_f.pdf.

[532] See for instance **Beigbeder**, **Y.** (2002). Judging Criminal Leaders. The slow erosion of impunity. The Hague/Londond/New York, Martinus Nijhoff Publishers. At page 132.

[533] Of course if one wants to argue that at the stage of investigations of the proceedings Art. 68 is not applicable at all one might also argue, that an appellate procedure as to this stage is not admissible neither.

that Part 6 of the Statute entitled "The Trial" is applicable *mutatis mutandis* to the appellate proceedings.

It seems that so far the ICC Prosecutor[534] and the Appeals Chamber[535] do act on the assumption that victim participation is possible in interlocutory appeals. The OTP has stressed that participating victims will be required to make a new application to participate at the Appeals Chamber where they will be required to demonstrate that the substance of the appeal affects their personal interests, and that their participation at this stage is appropriate. Regulation 86(8) provided that "[a] decision taken by a Chamber under rule 89 shall apply throughout the proceedings in the same case, subject to the powers of the relevant Chamber in accordance with rule 91, sub-rule 1". The prosecution has, in previous proceedings, submitted that the underlying purpose of this Regulation was to ensure that victims were not required to make separate applications to participate in the natural continuation of the same proceedings adjudicating the same substance merely because they had moved on to the next stage of the determination. In contrast, appellate proceedings on interlocutory matters are arguably not a natural continuation of the proceedings, nor do they deal with the same issues. Rather, they are distinct proceedings with a specific and confined corrective purpose. The Appeals Chamber though is not required to determine afresh the status of an applicant as a victim-participant. Instead, the Appeals Chamber is required to determine whether the personal interests of the victim are affected by the present proceedings, whether the participation of the victim is appropriate in the present proceedings and the scope of any such participation. The participation in an interlocutory appeal should be based first and foremost on Article 68 (3) and the criteria set out in the Article must be fulfilled. Above all, the personal interests of victims have to be affected in that instance, victims have to clearly articulate before the Appeals Chamber the specific manner in which the issues

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[534] Prosecutor, Situation in the Democratic Republic of the Conge in **Prosecutor vs. Thomas Lubanga Dyilo,** Prosecution's Response to Request of Victims to Participate in the Appeal, pursuant to 'Order of the Appeals Chamber' of 4 December 2006 of 6 December 2006, Case No. ICC-01/04-01/06-757, paras. 11 et seq.

[535] Appeals Chamber, Situation in the Democratic Republic of the Conge in **Prosecutor vs. Thomas Lubanga Dyilo,** Decision of the Appeals Chamber of 12 December 2006, Case No. ICC-01/04-01/06-769, at page 3.

involved in the appeal affected their personal interests and why it is appropriate for them to participate at that stage of the proceedings.[536]

It is doubtful whether from Regulation 86(8) there is any requirement for a fresh application. It is not evident why the procedure for victims should be made more complicated than necessary. The Chamber may simply require that victims explain their specific interests without forcing them to make a whole new application, thereby also exposing them to the risk of delay. In the victim participation form it is already possible to request also to be allowed to participate in appellate proceedings from the beginning.[537]

It is thus to be assumed that victims may participate in an interlocutory appeal and without applying anew.

As regards appeals requiring leave of the Court, after reaching its decision on a request for leave to appeal, the Chamber will then, according to Rule 155(2), have to notify also all those victims who participated in the proceedings giving rise to the decision.

2. Propriu motu investigations

If the prosecutor initiates investigations *propriu motu,* according to Art. 15, para. 2, he or she shall analyse the seriousness of the information received and he or she shall initiate an investigation unless he or she determines that there is no reasonable basis on which to proceed.[538] By providing information a victim cannot exert much influence over the exercise of this power as it is permissive rather than mandatory. There is no way to force the prosecutor to initiate investigations pursuant to Art. 15 which provides for wide

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[536] Prosecutor, Situation in the Democratic Republic of the Conge in **Prosecutor vs. Thomas Lubanga Dyilo,** Prosecution's Response to Request of Victims to Participate in the Appeal, pursuant to Order of the Appeals Chamber' of 4 December 2006 of 6 December 2006, Case No. ICC-01/04-01/06-757, paras. 12 et seq.

[537] See the ICC standard application form at page 9.

[538] Rule 48 provides that "in determining whether there is a reasonable basis to proceed with an investigation under Art. 15(3), the Prosecutor shall consider the factors set out in Art. 53(1)(a) to (c)".

prosecutorial discretion.[539] Still, the word "shall" makes it clear that the prosecutor is bound at least to give proper consideration to the information received.[540]

If the prosecutor decides that information is not serious enough, the provider of information will be informed of this fact[541] along with reasons and instructions as to where the appropriate forum is to submit further information regarding the same situation in the light of new facts and evidence.[542] It seems that some authors have said that the OTP has only the duty to inform the individual or legal person who first brought the relevant situation to the attention of the OTP. However, Art. 15(6) and Rule 49 do not distinguish between original and subsequent informants. Moreover, it is submitted that such an approach does not fit well with the universal personal scope of the right to report crimes to the OTP. Thus, it can be said that the OTP must inform all individuals or legal persons who have reported crimes in connection with the situation under preliminary examination.[543]

Rule 49 (1) RPE does not make the notification subject to any conditions, it is only stated that it may be affected by any danger to the safety, well-being and privacy of the addressees or the integrity of the proceedings.

There is no procedure for victims to review this negative decision.

It is also not clear if there is a right to review for the Pre-Trial Chamber pursuant to Art. 53(3)(b) eventually giving victims the possibility to participate in this procedure. In

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[539] See **Möller**, **C.** (2003). Völkerstrafrecht und Internationaler Strafgerichtshof - kriminologische, straftheoretische und rechtspolitische Aspekte. Münster, LIT Verlag, **Tolmein**, **O.** (2003). "Besserungsanstalt für den Süden? Für und Wider des Internationalen Strafgerichtshofs." iz3w **271**(sept 2003): 29-32. At page 29.

[540] **Bergsmo**, **M.** and **J. Pejic** (1999). Art. 15 Prosecutor. Commentary to the Rome Statute of the International Criminal Court. Observers' Notes, Article by Article. O. Triffterer. Baden Baden, Nomos Verlagsgesellschaft**:** 359-372. At page 365.

[541] See Art. 15(6).

[542] See Rule 49.

[543] See **Olasolo**, **H.** (2005). The Triggering Procedure of the International Criminal Court. Leiden, Boston, Martinus Nijhoff Publishers. At page 64.

favour of such an idea reliance has been placed on Rule 48 which states that "in determining whether there is a reasonable basis to proceed with an investigation under Art. 15(3) the Prosecutor shall consider the factors set out in Art. 53(1)(a) to (c). [544] However, this could be seen as a mere referral to the legal consequences of the provision rather than creating substantive rights. The latter view is supported by the fact that the referral is explicitly limited to "determining whether there is reasonable basis to proceed".

It can be argued further that the power to initiate investigations under Art. 15(1) reflects the notion of prosecutorial independence[545], it gives much more discretion to the Prosecutor then in the situation of referral so that it can be supposed that control by the Pre-Trial Chamber was not intended.

Indeed, the issue was hotly debated in the Preparatory Commissions. However, even if no definite answer was found[546] the structure of Rule 105 at least reduced some of the ambiguity and it is now more difficult to argue that the Prosecutor's decision not to seek authorization under Art. 15 could be subject to review by the PTC under Art. 53.[547]

However, it has been said that because Art. 15(3) provides that "if the Prosecutor concludes that there is a reasonable basis to proceed with an investigation, he or she shall submit to the Pre-Trial Chamber a request for authorisation" the use of the word "shall" rather than "may" could be seen as indication of the drafters' intention not to leave the

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[544] **Stahn**, **C.**, **H. Olasolo**, et al. (2006). "Participation of Victims in Pre-Trial Proceedings of the ICC." Journal of International Criminal Justice **4**(1): 219-238. At page 229.

[545] **Bergsmo**, **M.** and **J. Pejic** (1999). Art. 15 Prosecutor. Commentary to the Rome Statute of the International Criminal Court. Observers' Notes, Article by Article. O. Triffterer. Baden Baden, Nomos Verlagsgesellschaft**:** 359-372. At page 364.

[546] The review provisions under Art. 53(3) do not differentiate between a decision not to initiate an investigation and a decision not to prosecute.

[547] See **Friman**, **H.** (2001). Investigation and Prosecution. The International Criminal Court Elements of Crimes and Rules of Procedure and Evidence. R. S. Lee. Ardsley, New York, Transnational Publishers**:** 493-538. At page 497.

Prosecutor with discretion to determine whether an investigation should or should not be commenced.[548]

On the other hand it has been suggested that the *propriu motu* situation is different to where the Prosecutor is acting on referral. In the absence of the OTP's activation request which is the prerequisite for the PTC to exercise the triggering dimension of the Court's jurisdictional powers under Art. 15(4), there was no triggering procedure and, so the PTC could not intervene.[549] The more convincing arguments are ultimately those which deny the possibility of or intention for a review function in these cases.

If the Prosecutor now concludes that there is a reasonable basis to proceed with an investigation, he or she shall, according to Art. 15(3), submit to the PTC a request for authorization of an investigation, together with any supporting material collected.

The Prosecutor must inform victims known to him or her or to the Victims and Witnesses Unit of this decision, unless doing so would pose a danger to the integrity of the investigation or the life or well-being of victims and witnesses.[550]

The scope of notification to those "known to the Prosecutor or the VWU" is broader then other notification rules which refer to previous participation or communication. It is to be welcomed that many victims will be given the opportunity to exercise their right to make representations pursuant to Art. 15(3) by prior notification. Indeed, the present notification rule places a greater duty of notification on the Prosecutor than it is found in many national jurisdictions.[551]

Of course, it could be argued, that at such an early point of the proceedings the duty to notify should be even broader. However, on the other hand it might be considered that the

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[548] **Stahn**, **C.**, **H. Olasolo**, et al. (2006). "Participation of Victims in Pre-Trial Proceedings of the ICC." Journal of International Criminal Justice **4**(1): 219-238. At page 229.

[549] See **Olasolo**, **H.** (2005). The Triggering Procedure of the International Criminal Court. Leiden Boston, Martinus Nijhoff Publishers. At page 65.

[550] See Rule 50(1).

[551] **Stahn**, **C.**, **H. Olasolo**, et al. (2006). "Participation of Victims in Pre-Trial Proceedings of the ICC." Journal of International Criminal Justice **4**(1): 219-238. At page 228.

OTP could be overly burdened by no longer being able to investigate efficiently. Furthermore, the Prosecutor may also give notice by general means if he or she determines in the particular circumstances of the case that such notice would not pose a danger to the integrity and effective conduct of the investigations or to the security and well-being of victims.[552] Of course, confidentiality may be crucial both to preserve the effectiveness of the investigation and to protect the security of potential witnesses, particularly at the very preliminary stage, before an investigation has commenced. [553]

In any case, provided that the Court comes up with sufficient outreach work, it would not be too much to expect of the victims to make their interest in the proceedings clear by communicating with the Court. Of course, as long as the outreach work remains insufficient such an expectation may be unreasonable.

Victims can exert influence over the decision of the PTC concerning the authorization of an investigation insofar as they may make representations to the PTC at this stage of the proceedings.[554] Such representations shall, according to Rule 50(3), be in writing and according to Regulation 50(1) be made within 30 days of the OTP's notification. Representations may be made irrespective of whether or not victims have previously submitted communications to the Prosecutor.

Victims' involvement in the process of obtaining the PTC's authorization for an investigation is based on the assumption that victims are likely to be best informed about the nature and extent of the crimes that took place in the case at hand, that they will be best placed to describe the actual commission of crimes and may be able to give a more personal perspective on the events as presented by the Prosecutor. The involvement of

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[552] See Rule 50(1).

[553] Similarly **Timm**, **B.** (2001). The Legal Position of Victims in the Rule of Procedure and Evidence. International and National Prosecution of Crimes under International Law. H. Fischer, C. Kreß and S. R. Lüder. Berlin, Berlin Verlag**:** 289-307. Pp 204 et seq.

[554] See Art. 15(3).

victims at this stage also serves to enhance the objectivity of proceedings by ensuring a view other than the Prosecutor's is presented to the Pre-Trial Chamber.[555]

Representations as provided for in Rule 50(3) are not equivalent to participation in the sense of Art. 68. Through representations, it seems at first glance, victims are confined to written participation[556] on a certain topic.[557]

This view may be supported by the fact that the drafters chose to insert the word "representations", not for instance "observations" which typically refers to written as well as oral participation.[558]

It has been suggested that even if Rule 50(3) speaks of "representations in writing", Rule 50(4), giving the Chamber the power to request additional information "from any of the victims who have made representations" and to hold a hearing, could give room for a more flexible approach although the Rule does not expressly provide for wider victim involvement, such as through the making of oral submissions.[559] It is submitted here that even if the Chamber may indeed be interested in hearing from victims because they might be able to give a more personal perspective, the arrangement of Rule 50 clearly sets its para. 4 as an exception to the rule of written representations.

The participatory right to make representations seems to be attributed to victims independently of the making of a formal application under Rule 89 and independently of the requirement of a "personal interest" under Art.68 (3).[560] This could allow for

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[555] **Stahn**, **C.**, **H. Olasolo**, et al. (2006). "Participation of Victims in Pre-Trial Proceedings of the ICC." Journal of International Criminal Justice **4**(1): 219-238. At page 228.

[556] See (2003). Victims' Guide to the International Criminal Court, Reporters without borders. At page 60.

[557] In the case of the *propriu motu* investigation the representations will typically relate to the question of whether there is "…a reasonable basis to proceed with an investigation".

[558] See for instance Rule 91(2) last sentence.

[559] See **Stahn**, **C.**, **H. Olasolo**, et al. (2006). "Participation of Victims in Pre-Trial Proceedings of the ICC." Journal of International Criminal Justice **4**(1): 219-238. At page 228.

[560] Art. 15 has been shaped as a special rule in relation to Art. 68 as can be seen for instance from Rule 92.

relatively wide participation which further indicates that "representations" will be confined to written form.

Rule 50(5) RPE provides for the notification of the PTC's decision granting or rejecting the OTP's activation request to those victims of the situation who have participated in the proceedings. If after a request of authorization the Pre-Trial Chamber decides not to authorize the commencement of the proceedings there is again no procedural means for victims to have this decision be reviewed.

3. Conclusion

In conclusion, it appears that even if victims have rights in the investigation and trial processes, their right to a trial per se is rather limited.[561] Besides providing information, victims cannot trigger investigations. The initiation of investigations is subject to the prosecutor's relatively wide discretion with no review rights for victims and very limited opportunities to participate in other parties' reviews.

It is essential that the wide discretion of the Prosecutor together with the disqualification of victims from the initiation of investigations do not lead to frustration for victims. The danger would be that even if, according to Art. 1, only cases which were not subject of national proceedings were dealt with, the number of remaining cases is still too large due to the limited resources of the ICC. Especially if a domestic criminal justice system malfunctions, it might well be that the number of cases that are not being prosecuted exceeds the number of cases that are being prosecuted by the ICC, with the result that the perpetrators of crimes may escape prosecution and punishment. If the ICC, like the ICTs, focuses on persons in leading positions, which can be assumed[562], this could have the effect that the *de facto* assaulters of victims will not be prosecuted. Furthermore, the Rome Statute makes no explicit reference to a right of a State Party to grant amnesty.

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[561] See also **Scomparin**, **L.** (2003). La victime du crime et la juridiction pénale internationale. La justice pénale internationale entre passé et avenir. M. Chiavario. Paris, Dalloz-Giuffrè**:** 335-352. At page 339 who opines that within certain limits, victims do have a right to a process out of Art. 65(4).

[562] See also **Heikkilä**, **M.** (2004). International criminal tribunals and victims of crimes. Turku, Institute for Human Rights, Abo Akademi University. At page 60.

Some of the Statute's provisions may allow for indirect recognition of the practice[563], so that national amnesties could also lead to impunity. In selecting a limited number of cases political consideration will also play a role.

Furthermore the selection of a small number of persons for prosecution may create the false impression that the crimes committed by those who do not face prosecution by the International Criminal Court are less serious and perceived as such by the International Community.[564]

Finally the choice of who will be prosecuted will depend heavily on who can be found and arrested because the ICC does not have its own police force and depends to a large degree on the cooperation of states.

Problems can arise for victims from this selection process in addition to their eventually feeling helpless due to their very limited right to a trial per se. First, the choice might seem to victims to be subjective, random or the result of political influence without prosecutorial and judicial independence. Victims could feel that they are being treated as "second class" because their cases are not heard before the ICC but before national trials instead or not at all. Altogether it seems certain that a certain number of victims will be excluded from participating before the ICC as a result of the selection of only a few cases for prosecution.

The limited resources of the ICC mean that the fact that only a few cases will be prosecuted cannot be avoided. It can only be hoped that in future there will be increased resources and that cases will be selected wisely.

For those cases that will not be prosecuted alternatives should be provided.[565] Above all victims should not be misled about the powers and functions of the ICC or extent of their

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[563] **Pinto**, **M. C. W.** (2003). Truth and consequences or truth and reconciliation? Some thoughts on the potential or official truth commissions. Man's Inhumanity to Man. Essays on International Law in Honour of Antonio Cassese. L. C. Vohra, Y. Featherstone, O. Fourmyet al. The Hague, Kluwer Law International. At page 723.

[564] See also **Tolmein**, **O.** (2003). "Besserungsanstalt für den Süden? Für und Wider des Internationalen Strafgerichtshofs." iz3w **271**(sept 2003): 29-32.

[565] See below Chapter „Alternatives".

own influence over its proceedings. If the ICC is praised as being "victim-friendly" it is mostly with regard to the rights of victims in the proceedings. However, it should not be forgotten that many victims cannot access these rights, because their cases are not being dealt with before the ICC and their influence on this matter is very limited.

III. Participation in the investigations according to Art. 68(3)

Once the investigations are underway, the Rome Statute provides that the Prosecutor must take "measures to ensure the effective investigation and prosecution of crimes … and in doing so respect the interests and personal circumstances of victims and witnesses and the nature of the crime".[566] It is thus stressed that that the work of the Prosecutor does not take place in a vacuum but rather against the backdrop of traumatic incidents from the point of view of the sheer scale of the crimes and individual trauma caused for individual witnesses and victims.[567]

1. Applicability of Art. 68(3)

A very interesting and controversial question is whether victims can participate in the investigations once these are under way but have gone no further than the investigatory stage. Art. 15 only provides for the possibility of exerting influence over the initiation of the investigations. However, participation in the proceedings could be possible through the application of Art. 68(3) to the investigatory stages even if the Prosecutor has not yet requested a warrant of arrest or summons to appear.

On the other hand, it is not necessarily clear that Art. 68(3) located as it is in Part 6 of the Statute entitled "The Trial", should be applicable to the stage of investigations of a situation.

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[566] See Art. 54.

[567] **Bergsmo**, **M.** and **P. Kruger** (1999). Art. 54 Duties and powers of the Prosecutor with respect to investigations. Commentary on the Rome Statute of the International Criminal Court. Observers' Notes, Article by Article. O. Triffterer. Baden-Baden, Nomos Verlagsgesellschaft**:** 715-725. At page 719.

In a decision of January 17th 2006[568], which has been regarded as the Court's first significant decision[569], Pre-Trial Chamber I has accorded victims the right to participation, thus allowing them to participate in the proceedings at the stage of investigations of the situation in the DRC and proceedings sequential thereto. The applicants' request was approved pursuant to the provision of Art. 68(3) of the Statute.

The Prosecutor sought the leave of PTC I to appeal the above decision under the provisions of Art. 82(1)(d) of the Statute.[570] The Prosecutor opposed applications for the participation of victims in the investigation phase on the basis that this is not envisaged by the ICC Statute.

The Prosecutor's application was refused.[571] The Prosecutor then sought review of this decision, albeit a review of an extraordinary nature, styled "extraordinary review", in that no provision is made in the Statute or RPE for such an extraordinary step.[572] This application, too, was dismissed. The Appeal Chamber reasoned that Art. 82(1)(d) of the Statute did not confer a right to appeal interlocutory or intermediate decisions of either the Pre-Trial or Trial Chamber. The Appeal Chamber denied the existence of a *lacuna* in

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[568] See PTC I, **Situation in the Democratic Republic of the Congo**, Decision on the applications for participation in the proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6 of 17 January 2006, Case No. ICC-01/04.

[569] **Henzelin**, **M.**, **V. Heiskanen**, et al. (2006). "Reparations to Victims before the International Criminal Court: Lessons from International Mass Claims Processes." Criminal Law Forum **17**: 317-344. At page 317

[570] See Prosecutor, **Situation in the Democratic Republic of the Congo,** Prosecution's Application for Leave to Appeal Pre-Trial Chamber I's Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6 of 23 January 2006, Case No. ICC-01/04-103.

[571] See PTC I, **Situation in the Democratic Republic of the Congo,** Decision on the Prosecution's application for leave to appeal the Chamber's decision of 17 January 2006 on the applications for participation in the proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6 of 31 March 2006, Case No. ICC-01/04-135-tEN.

[572] Prosecutor, **Situation in the Democratic Republic of the Congo,** Prosecutor's Application for Extraordinary Review of Pré-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal of 24 April 2006, Case No. ICC-01/04-141.

Art. 82 and thus did not acknowledge a right to extraordinary review.[573] The participation of victims at the investigatory stage of a situation has therefore been affirmed for now. However, it may be assumed that this decision, as it was so hotly contested, will not necessarily be the final word on this topic.

As for the reasoning, PTC I has derived the right to participate at the investigatory stage of a situation from Art. 68(3). With regard to textual arguments, the Chamber stated that the word "proceedings" in Art. 68 also comprised the investigation phase because the expression "proceedings" is used in this way in several parts of the ICC Statute.[574]

In contrast, the Prosecutor submitted that the ICC Statute provides a clear distinction between the expressions "proceedings" and "investigations", which accordingly, have two different meanings.[575] The word "proceedings" consequently do not cover the investigatory stage and Art. 68(3) thus does not allow victims to participate in the investigatory stage.[576]

On a contextual basis, the PTC argued that the provisions under Chapter VI of the ICC Statute include general principles applicable at different stages of the proceedings and that Art. 68(3) could therefore also be interpreted as referring to investigations.[577] The Chamber then noted that Rule 89 in Section III of Chapter 4[578] contains provisions that

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[573] See Appeals Chamber, **Situation in the Democratic Republic of the Congo**, Judgement on the Prosecutor`s application for extraordinary review of Pre-Trial Chamber I's 31 March decision denying leave to appeal of 13 July 2006, Case No. ICC-01/04-168 13-07-2006, para. 39.

[574] See PTC I, **Situation in the Democratic Republic of the Congo**, Decision on the applications for participation in the proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6 of 17 January 2006, Case No. ICC-01/04, pp 7 et seq.

[575] See Prosecutor, **Situation in the Democratic Republic of the Congo**, Prosecution's Reply on the Applications for Participation 01/04-1/dp to 01/04-6/dp of 15 August 2005, Case No. ICC-01/04-84-Conf, para.13.

[576] See Prosecutor, **Situation in the Democratic Republic of the Congo**, Prosecution's Reply on the Applications for Participation 01/04-1/dp to 01/04-6/dp of 15 August 2005, Case No. ICC-01/04-84-Conf, para.13 et seq.

[577] See PTC I, **Situation in the Democratic Republic of the Congo**, Decision on the applications for participation in the proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6 of 17 January 2006, Case No. ICC-01/04, para. 42.

[578] Entitled "Provisions relating to various stages of the proceedings".

are applicable to the investigatory stage.[579] With regard to Rule 92(2) and (3), the Chamber submitted that this Rule can not confine the participation of victims to the stages mentioned there because pursuant to Art. 51(5) of the Statute, the Statute takes legal precedence over the RPE. It followed that a provision of the Rules could not be interpreted in such a way as to narrow the scope of an article of the Statute. It was further submitted that Rule 92 is a notification rule and that it therefore cannot limit the participation of victims to the stages mentioned in sub-rules 2 and 3 of the rule.[580]

The Prosecutor on the other hand argued that the position of Art. 68 under Chapter VI of the Statute entitled "The Trial" and the drafting history of Art. 68 made it clear that the provision did not refer to the investigation phase.[581] He felt that Rule 92 confined the participation of victims to the stages mentioned in sub-rules 2 and 3 of that Rule.[582]

With regard to the teleological argument, the PTC found that the participation of victims at the discussed stage of the proceedings conformed with the aims and objectives of the ICC Statute since the purpose and objective of the Statute was to grant victims an independent voice and role in the proceedings and that they should be able to exercise this independence, in particular, vis-à-vis the Prosecutor.[583] The ECHR and the ICHR, had

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[579] See PTC I, **Situation in the Democratic Republic of the Congo**, Decision on the applications for participation in the proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6 of 17 January 2006, Case No. ICC-01/04, para. 37.

[580] See PTC I, **Situation in the Democratic Republic of the Congo**, Decision on the applications for participation in the proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6 of 17 January 2006, Case No. ICC-01/04, paras. 47, 48.

[581] See Prosecutor, **Situation in the Democratic Republic of the Congo**, Prosecution's Reply on the Applications for Participation 01/04-1/dp to 01/04-6/dp of 15 August 2005, Case No. ICC-01/04-84-Conf, paras. 18 et seq.

[582] See Prosecutor, **Situation in the Democratic Republic of the Congo**, Prosecution's Reply on the Applications for Participation 01/04-1/dp to 01/04-6/dp of 15 August 2005, Case No. ICC-01/04-84-Conf, paras. 18 et seq.

[583] See PTC I, **Situation in the Democratic Republic of the Congo**, Decision on the applications for participation in the proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6 of 17 January 2006, Case No. ICC-01/04, para.51.

also let victims of human right violations participate from the beginning of the investigatory stage and prior to confirmation of charges.[584]

The Prosecutor on the other hand contended that victim participation at the investigatory stage was inappropriate. The participation granted would affect the fair and expeditious conduct of the proceedings.[585] According to the OTP the decision affects the integrity and impartiality of the investigations. It will endanger the integrity of investigations by allowing the consideration of external factors. It could also open the door for direct and unregulated presentation of evidence. This in turn might lead to the consideration by the Chamber of material gathered outside the framework of the investigations which could very easily lead to consideration by the Chamber of unreliable and prejudicial material, and even of material that was forged or fabricated. The investigations process could theoretically be abused by "any person".

The privacy, safety and well-being of victims and witnesses could also be jeopardized, for instance, because it would be impossible to prevent undue access to sensitive information. Furthermore, the OTP argued that the decision could cause prejudice to the rights of the defence and cause an imbalance between victims and the future accused. The breadth and scope of the rights accorded to victims could not be counterbalanced by counsel representing the arrested person because such a person does not exist at this point of the proceedings. A decisive point for the OPT with regard to the fairness of the proceedings was that the PTC acted *ultra vires* its power with regard to the "grounds to believe"-criterion. The PTC was not an investigation chamber but the "ground to believe"-criterion would require the Chamber to verify the existence of a crime not yet being in the possession of allegations brought by the prosecution. The Chamber would therefore have to engage in fact-finding activity without having any investigative tools. Such an

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[584] See PTC I, **Situation in the Democratic Republic of the Congo**, Decision on the applications for participation in the proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6 of 17 January 2006, Case No. ICC-01/04, paras. 52 et seq.

[585] See Prosecutor, **Situation in the Democratic Republic of the Congo,** Prosecution's Application for Leave to Appeal Pre-Trial Chamber I's Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6 of 23 January 2006, Case No. ICC-01/04-103, paras. 12 et seq.

approach might lead to the Court making findings on issues which it would be required to determine later and by acting in this manner it would already be prejudging the matter.

Finally, the OTP argued that the decision would significantly affect the expeditious conduct of proceedings. The Chamber's ruling created a new category of "situation victims" thereby potentially allowing a very large number of victims to participate. The decision thus created a serious burden for all organs of the Court, with an apparently detrimental impact on the efficiency of pre-trial proceedings.

The PTC did not agree with these arguments.[586] It was of the view that the integrity and impartiality of the investigations were not endangered, but rather guaranteed and preserved by the Chamber with its decision. The Prosecutor had not presented evidence that would enable the Chamber to find that its decision undermined the fairness of the proceedings. The Prosecutor would be notified of documents or material presented by victims, and would have all necessary latitude to respond. It held that the system of victim participation only enhanced the impartiality of the Prosecutor in that it would afford him access to additional evidence. With regard to the confidentiality of the proceedings the Chamber stated that improving the rights of victims did not entail giving access to the confidential documents in "the record of the investigation". Furthermore, the Chamber considered that the system of victim participation as provided for in the decision was very limited, largely because it provided for a case-by-case assessment of victim participation. The Chamber would take such measures under Arts. 56 and 57 as were necessary to preserve the integrity of the proceedings.

With regard to the safety and well-being of victims, the Chamber stated that in accordance with its duties under of Art. 57(3)(c), it would ensure protection and privacy where necessary. The rights of the future accused would not be prejudiced for two reasons: first, because he or she would be afforded access to all evidence for the purposes of preparing the defence and second as the Chamber had appointed an *ad hoc* counsel for the Defence whose responsibility it was to promote the rights of the accused. Finally, with

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[586] See PTC I, **Situation in the Democratic Republic of the Congo,** Decision on the Prosecution's application for leave to appeal the Chamber's decision of 17 January 2006 on the applications for participation in the proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6 of 31 March 2006, Case No. ICC-01/04-135-tEN, paras. 32 et seq.

regard to the "ground to believe"-criterion, the Chamber considered that a test enabling a victim status assessment to be made at the investigation stage of a situation needed to be defined. The Chamber would not be prejudging any material issues, as it had stated in its decision that the findings could be re-examined on the basis of information available to the Chamber later in the proceedings.

Apart from the PTC's decision in 2006 there is little to be found on the topic of applicability of Art. 68(3) to investigations.

The International Federation of Human Rights ("FIDH") which has assisted the victims in making their requests, welcomed the decision as an "international legal first". The President of the organization, Sidiki Kaba, stated that "for the first time the violation of the fundamental rights of victims, the harm they have suffered and their rights to defend their interest have been recognized by a Court."[587] In support of the decision it has been put forward that it will allow judges to place pressure on the Prosecutor to proceed with an investigation.[588]

Some have argued that Art. 68(3) is not applicable to the stage of the investigations, though most of these views were put forward before the decision was handed down.[589]

There have also been some arguments made against the PTC's decision.[590] Some of these mention the potential dangers to the efficiency and expeditiousness of the proceedings as

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[587] See **FIDH** Press Release of 20 January 2006: "First victims recognised by the International Criminal Court", available online at http://www.fidh.org/article.php3?id_article=2998 .

[588] **de Hemptienne**, **J.** and **F. Rindi** (2006). "ICC Pre-Trial Chamber Allows Victims to participate in the Investigation Phase of Proceedings." Journal of International Criminal Justice **4**(1): 342-350. At page 346.

[589] See e.g. **David**, **E.** (2005). "La participation des victimes au procès devant la Cour pénale internationale." Recueil des cours de l'Académie de droit international **313**: 325 et seq. Para 13; **Donat-Cattin**, **D.** (1999). Art. 68 "Protection of victims and witnesses and their participation in the proceedings". Commentary on the Rome Statute of the International Criminal Court. Observers´Notes Article by Article. O. Triffterer. Baden-Baden, Nomos Verlagsgesellschaft. At page 873; **Jorda**, **C.** and **J. de Hemptienne** (2002). The Status and Role of the Victim. The Rome Statute of the International Criminal Court, A Commentary. A. Cassese, P. Gaeta and J. R. W. D. Jones. Oxford, Oxford University Press. **2:** 1387-1419. At page 1406; see also **Bock**, **S.** (2007)."Das Opfer vor dem Internationalen Strafgerichtshof." Zeitschrift für die gesamte Strafrechtswissenschaft **119** (3)(2007): 664-680. At page 674.

well as to the rights of the accused. Second some have suggested that victims themselves might be frustrated if the Prosecutor concludes at a certain point that there is insufficient basis for prosecution leading to the victims being thrown out of the proceedings abruptly[591]thereby spattering unfulfilled hopes and danger.[592]

The question at hand seems to be rather complex, having to be analysed thoroughly. The PTC in its decision has adopted a rather technical approach which, though well argued and balanced, appears to have overlooked or avoided certain points. This is clear from the strong emphasis on terminological arguments.

Both the PTC and the OTP now attempted to find a definition of the word "proceedings" which would be valid for the whole of Statute and Rules citing examples of its usage from both sources. The PTC gave a number of examples where the word "proceedings" was used in the sense of including the investigatory stage. The OTP on the other hand, gave examples of the same word being used contrasted to the word „investigations". There was no mention by either side that the word "proceedings" is also used exclusively relating to the trial proceedings[593] or even only for parts of the trial proceeding[594]. Neither the Court nor the OTP has considered the possibility that the term "proceedings" is not used in an uniform way throughout the whole Statute and Rules. However, as seen above, there are more then two meanings and usages of the term „proceedings" in the Rules and Statute. For this reason, it is the view of the author, that it is not possible to derive a universally valid understanding of the term. As a result it is not possible to come to any definite conclusions from the wording of Art. 68 alone. Insofar as the Chamber notes that the

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[590] See for instance **Baumgärtner, E.** (2008). "Aspects of victim participation in the proceedings of the International Criminal Court." International Review of the Red Cross **90** (870): 409-440. At page 415 et seq; see also **Trumbull, Charles P.** "The victims of victim participation in international criminal proceedings." Michigan Journal of International Law **29**(277) (2008): pp. 777-826. At page 787 et seq.

[591] **de Hemptienne**, **J.** and **F. Rindi** (2006). "ICC Pre-Trial Chamber Allows Victims to participate in the Investigation Phase of Proceedings." Journal of International Criminal Justice **4**(1): 342-350. At page 347

[592] **Baumgärtner, E.** (2008). "Aspects of victim participation in the proceedings of the International Criminal Court." International Review of the Red Cross **90** (870): 409-440. At page 415 et seq.

[593] See e.g. Art. 64 where the term „proceedings" is used as referring only to the Trial proceedings.

[594] See e.g. Art. 64(7).

investigation stage is not explicitly excluded from the scope of application of Art. 68(3) one can reply that the investigation stage is not explicitly included either.

With regard to the contextual arguments, the position of Art. 68 in the Chapter entitled "The Trial" surely is not without significance. Interestingly, when dealing with the accused' s right to a fair and expeditious trial, PTC I did not refer to Art. 67(1)(c) but to general international principles which shows that it is not self-evident that principles from Part 6 of the Statute are applicable throughout the whole proceedings.[595]

Art. 68(3) might be viewed as a general authorisation clause, which must be implemented through other specific provisions in the Statute and Rules and does not therefore serve as an independent source of the Court's power to allow for a broader scale of victim involvement. The very detailed rule of Art. 15 could be seen as a more specific rule which bars the application of Art. 68 to the investigative stage. The only evidence for this can though be seen in Rule 92(2) and (3).

If one assumes that the Statute does not explicitly provide for victim involvement at the investigation stage, then Art. 51 does not apply as stated by the Chamber. It might accordingly be that Rule 92 has the scope of limiting but this is on the other hand not really obvious from the Rule which is only applicable to notification.

It is true that Rules 89 et seq are to be found in the Chapter entitled "various provisions" but this does not necessarily mean that all provisions are applicable to the investigation stage.

In terms of context, it may be noted further that in Rule 89 it is provided that once a victim has made an application, the Registrar shall transmit the application to the relevant Chamber, as well as to the Prosecutor and the defence. One could assume that this means that the rule does not apply to victim participation as provided for in Art. 68 until the

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[595] See PTC I, **Situation in the Democratic Republic of the Congo,** Decision on the Prosecution's application for leave to appeal the chamber's decision of 17 January 2006 on the applications for participation in the proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6 of 31 March 2006, Case No. ICC-01/04-135-tEN, paras 32 et seq.

point that it can be forwarded to the defence. However, the nomination of *ad hoc* counsel as provided for by the Chamber should be sufficient at least for this purpose.

The contextual arguments thus give indications of which interpretation is correct but do not provide for a definite answer.

With regard to teleological arguments, the PTC recognised only one aim of the Statute: to grant an independent voice to victims. However, the Statute has many more objectives than only this, including the aim of protecting the rights of the accused.[596]

The PTC's decision thereby fails to acknowledge the potential conflict between the interests of victims with other interests and objectives of the Statute. First, victims' rights could conceivably clash with the accused's right to expeditious proceedings. Whether the PTC's decision will effect the expeditiousness of proceedings will, to a certain extent depend on the actual number of applications made by victims. On this issue it has been said that it would be misguided to believe that countless applicants will now seek victim status. Many victims have remained unaware of their rights or have been unable to complete the application form without legal assistance.[597] In response, it is submitted that while this may be an accurate representation of the actuality it should not be accepted as a legal argument as the ICC should aim to improve the information it provides to victims and its outreach on an ongoing basis. Thus, the Court should by no means rely on the fact that victims are currently not well-informed. Besides, currently the number of applications is constantly rising.[598] It might be possible to allow larger numbers of victims to participate without considerable delay by placing victims in smaller or bigger groups already at these early stages.[599] On the other hand it has been said that if the PTC were granted investigative powers this could help maintain the expeditiousness of the

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[596] See Art. 67.

[597] See **Donat-Cattin**, **D.** (1999). Art. 68 "Protection of victims and witnesses and their participation in the proceedings". Commentary on the Rome Statute of the International Criminal Court Observers' Notes Article by Article. O. Triffterer. Baden-Baden, Nomos Verlagsgesellschaft. At page 34.

[598] See the number of applications on the webpage of the ICC.

[599] As to this possibilites and the problems that might be associated with this possibility, see below pages 159 et seq.

proceedings.[600] However, it seems that the PTC's options are limited if there are large numbers of victims.

As to the rights of the accused it is difficult to determine if *ad hoc counsel* will have the capacity and opportunity to review and defend the rights of potentially many accused persons at that particular stage of the proceedings. As the Prosecutor has stated, *ad hoc* counsel cannot completely replace a full defence but if the participation rights of victims are limited at certain points it seems possible that *ad hoc* counsel would be able to represent the future accused. At this point, it must be noted that, Rules 81 and 82 pertaining to the confidentiality of documents collected by the Prosecutor during the investigation, among others, suggest that victims may not have access to the investigative files thus reducing the risk for the accused arising out of extended victims' participation.

The OTP's fear that the PTC's decision might open the door for direct and unregulated presentation of evidentiary or documentary material might also pose a further problem to the question of expeditiousness of proceedings. Of course, one may take the view that the decision will also afford the Prosecutor additional information. In response, it may be argued, however, that even if this information might prove useful and enrich and control the activity of the OTP, it does not necessarily pertain to the cases the PTC would, at that moment be investigating and could therefore slow down the process. It is also critical that the Chamber might, during the course of such a process, consider material collected outside the framework of the investigation.

The main argument in favour of early participation so far has always been the victims' interest in such proceedings. At this point, it is legitimate to ask, how much victims really profit from this possibility to participate early in the proceedings and hence how much the decision really is about the victims' interests as opposed to the distribution of power between the PTC and the OTP. The rights of the accused and the fairness and expeditiousness of the proceedings have been dealt with elaborately by PTC and OTP. With regard to the rights of victims the PTC has, in the author's opinion, too hastily

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[600] **de Hemptienne**, **J.** and **F. Rindi** (2006). "ICC Pre-Trial Chamber Allows Victims to participate in the Investigation Phase of Proceedings." Journal of International Criminal Justice **4**(1): 342-350. Pp 349 et seq.

assumed that early participation will serve the rights of victims in all cases. One may question whether the interests of the victims really were the only interests considered by the PTC or whether perhaps other interests may have influenced the decision.

This section will start from the assumption that if proceedings come into being before the ICC, the possibility of victim participation is important at any stage, without concluding that the proceedings or the way in which proceedings are initiated or effected are to be supported. Furthermore this does not mean that participation should be the only means of achieving the desired results, or that it does necessarily achieve such results. It is submitted that once participation can have unwanted or even fatal consequences for victims, these consequences must be either avoided by all means or if this is not possible, highlighted clearly in advance so that victims can decide if they want to participate or not on a basis of comprehensive information.

The most important motivation for victims to participate in the early investigations appears to be a desire to impact on the selection of who will be brought before the ICC as an accused. If the person in question will not be brought before the ICC, the "situation victim" will not become a "case victim" and as a consequence cannot participate in the proceedings any further. This now can lead to a victim feeling unacknowledged or even to retraumatisation. But how much influence is there really at this point? As has been seen before, the prosecution has been granted wide discretion[601] in the question of selecting the accused, therefore the possibility to really influence the selection of who will be accused will probably be very limited in general for victims.[602] Still, participating already in the investigations could give victims more influence then has been anticipated up to this point.

In this context, it is interesting to consider the present situation before the ICC: As a result of the decision of 17 January 2006 victims have been given the possibility of at least

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[601] See also **Tolmein**, **O.** (2003). "Besserungsanstalt für den Süden? Für und Wider des Internationalen Strafgerichtshofs." iz3w **271**(sept 2003): 29-32. At page 29.

[602] As to the legitimacy of selective prosecution see **Möller**, **C.** (2003). Völkerstrafrecht und Internationaler Strafgerichtshof - kriminologische, straftheoretische und rechtspolitische Aspekte. Münster, LIT Verlag. Pp 306 et seq.

potentially impacting on the selection of the accused. However, only shortly afterwards, on 10 February 2006, in the same case an arrest warrant was issued. It seems that there were not many possibilities given to influence this decision in the short time between the decision being handed down and the arrest warrant being issued. Indeed, it may even be assumed that at the time of the decision the matter of who would be chosen as accused had already been settled. Subsequently all the victims that had applied so far were dismissed from the proceedings because they did not qualify as "case victims".[603]

Not only may the benefit of participation at this early stage for victims be rather limited, it seems that they will also have to take large risks by participating at this stage as it seems unclear if the ICC can provide for sufficient protection after the victims are no longer participating, especially when there are larger numbers of victims. On behalf of the ICC it has been said that the anonymity granted is enough to spare victims from negative consequences.[604] This might be true for an anonymous society where people live in places such as big cities. However, this could be different in smaller communities where contact with the ICC might be difficult to hide. It cannot completely be ruled out that persons may be in danger and it seems that the ICC has not taken the necessary measures to avoid these dangers.[605]

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[603] See PTC I, Situation in the Democratic Republic of the Congo **Prosecutor vs. Thomas Lubanga Dyilo,** Decision on the Applications for Participation in the Proceedings Submitted by VPRS 1 to VPRS 6 in the Case the Prosecutor v. Thomas Lubanga Dyilo of 29 June 2006, Case No. ICC-01/04-01/06-172-tEN.

[604] See PTC I, Situation in the Democratic Republic of the Congo **Prosecutor vs. Thomas Lubanga Dyilo,** Decision on the Applications for Participation in the Proceedings Submitted by VPRS 1 to VPRS 6 in the Case the Prosecutor v. Thomas Lubanga Dyilo of 29 June 2006, Case No. ICC-01/04-01/06-172-tEN.

[605] As to experiences before the ICTY see **Stover**, **E.** (2005). The Witnesses War Crimes and the Promise of Justice in The Hague. Philadelphia, University of Pennsylvania Press. At page 1 who states victims in some cases were sure that word had already leaked out about his or her testimony… including a neighbour who had returned home to find a death threat spray painted across the windshield; See **Chifflet**, **P.** (2003). The Role and Status of the Victim. International criminal law: developments in the case law of the ICTY. W. A. Schabas and G. Boas. Leiden, Martinus Nijhoff**:** 75-111. At page 89; **Fitzgerald**, **K.** (1997). "Problems Of Prosecution and Adjucation of Rape and Other Sexual Assaults under International Law." European Journal of International Law **8**(4): 638-663. See pages 640, 641;**McDonald**, **A.** (2002). The Role of Victims and Witnesses in International Criminal Trials. Treaty Enforcement and International Cooperation in Criminal Matters with special reference to the Chemical Weapons Convention. R. Yepes-Enriques and L. Tabassi. The Hague, T.M.C. Asser Press**:** 257-276. at page 263; see also **Kim**, **Y. S.** (2003). The International Criminal Court: A Commentary of the Rome Statute. Leeds, Wisdom House. At page 414 reporting the experience that some victims who testified

If victims cannot really exercise much power, do not profit much from participation and in general enjoy limited benefits from the process as shown, one might wonder whether other interests influenced the present decision or if the advantages for victims where really the main reason.

The decision not only awards far-reaching rights to victims, it also concedes powers to the PTC in giving it the position of an investigating chamber, a consequence which has been strongly criticized by the OTP. In response, the OTP has not only strongly questioned these rights of the PTC but has also applied for an "extraordinary appeal", a legal remedy which was not provided for by the Statute explicitly. The very first decision of the ICC already had had to decide on the powers of the PTC in contrast to those of the OTP.[606] One may therefore assume that there is an ongoing "battle" at the moment between the PTC and OTP as their respective competencies are not altogether clear as a consequence of a "hybrid" legal system[607] which on the first view offers different possibilities of how to interpret on this topic[608]. The question now of whether victims are to be allowed to participate in the investigations will, however, ultimately also depend on the question of the distribution of powers very much. It can be said that the more power the PTC has, the more it could positively influence the rights of victims. Admittedly it may be doubted whether the PTC has the means to gather evidence, up to now it has only relied on official reports which may not have much details as to the commission of crimes by individual persons.

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before the ICTR were killed, see also **Donat-Cattin, D.** (1999). Art. 68 "Protection of victims and witnesses and their participation in the proceedings". Commentary on the Rome Statute of the International Criminal Court. Observers´ Notes Article by Article. O. Triffterer. Baden-Baden, Nomos Verlagsgesellschaft. At page 871.

[606] There, the ICC Pre-Trial Chamber I broadened its role by referring to and interpreting the general provision contained in Article 57(3)(c) of the ICC Statute. Thus, the Chamber somewhat shifted the 'equilibrium' between legal traditions reached in Rome, arguably taking on a role more closely resembling an investigating judge than provided for in the Statute and ICC Rules of Procedure and Evidence. See **Miraglia**, **M.** (2006). "The First Decision of the ICC Pre Trial Chamber." Journal of International Criminal Justice **4**: 188-195. At page 188.

[607] Whereas "hybrid" means that elements have been taken from different legal systems.

[608] In common law systems the prosecution carries the investigation forward, while in civil law systems the judges control the pre-trial work. But at the ICC, with its unique system, set up by treaty in Rome in July 1998, the balance is yet to be established.

Another reason for of letting victims participate early in the proceedings could be to get them to also testify as witnesses. As testifying is voluntary[609] - the Court relies on victims coming to The Hague voluntarily in order to maintain its credibility and ensure the expeditious conduct of proceedings.

It must be hoped that victims have not been "used" in the present case to advance other interests and that in the future they may really influence decisions. The disadvantages that victim participation may have as stated above should be dealt with more explicitly and rigorously in future so that victims are free to decide whether they want to take the risks inherent in those disadvantages.

In interpreting the applicability of Art. 68 to the investigations it should ultimately not be forgotten that during the Preparatory Commissions its applicability was apparently not wanted.[610]

In conclusion, it can be said that victim participation in the investigative stage according to Art. 68 seem possible even if maybe the Statute originally may not have provided for such an opportunity. One decisive factor for the question of whether victims will in the long run really be able to participate in this part of the proceedings will be the distribution of powers between the PTC and the OTP, a question which is not yet resolved. Furthermore, early participation for victims will only be meaningful if the conditions are acceptable, if solutions can be found as to how to handle large numbers of applications, adequate protection will be given to victims and sufficient information is given to victims about the extent of their participation rights and the possible disadvantages thereof.

On January 23, 2008, two years after the first decision of Pre-Trial Chamber I, came a second development which is not closed yet: noting that various Chambers of the Court

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[609] See **Kreß**, **C.** (2001). Witnesses in the Proceedings Before the International Criminal Court: An Analysis in the Light of Comparative Criminal Procedure. International and National Prosecution of Crimes Under International Law. H. Fischer, C. Kreß and S. R. Lüder. Berlin, Berlin Verlag. At page 318.

[610] While issues relating to victims and witnesses were generally addressed under each relevant part of the Statute, a number of issues relating to victims under Parts 2, 5 and 6 were discussed together in informals coordinated by Håkan Friman (Sweden). During those informals it was agreed that a separate regime for victim participation at this stage was desirable rather than applying the general regime for notification and participation of victims in the proceedings under Part 6 (rule 6.30).

had interpreted the relevant provisions of the Rome Statute, the ICC Rules of Procedure and Evidence ("RPE"), and the Regulations of the ICC "in a significantly different manner", pre-trial judges assigned to the Darfur and DRC situations granted leave to appeal the question of whether they had correctly interpreted the governing rules to permit them to grant a "procedural status of victim", or the theoretical right to participate, during the investigative and pre-trial stages of proceedings.[611]

The Appeals Chamber in the DRC situation reversed the decision of Pre-Trial Chamber I of 7 December 2007 while the Appeals Chamber's in the Sudan situation will be published soon.[612]

2. The Conditions for the granting of victim status

In its decision on victim participation in the investigatory stage of the proceedings of 17 January 2006, PTC I has established two conditions that applicants must meet to be accorded victim status.

First, the Pre-Trial Chamber examined whether the personal interests of the victims[613] were affected during the investigation phase.[614]

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[611] See Pre-Trial Chamber I, Situation in Darfur, Sudan**,** Decision on Request for leave to appeal the "Decision in the requests of the OPCD on the Production of Relevant Supporting Documentation Pursuant to Regulation 86(2)(e) of the Regulations of the Court and on the Disclosure of Exculpatory Materials by the Prosecutor" of 23 January 2008, Case No ICC-02/05; Pre-Trial Chamber I, Situation in the Democratic Republic of the Congo, Decision on Request for leave to appeal the "Decision in the requests of the OPCD on the Production of Relevant Supporting Documentation Pursuant to Regulation 86(2)(e) of the Regulations of the Court and on the Disclosure of Exculpatory Materials by the Prosecutor" of 23 January 2008, Case No ICC-01/04.

[612] See Appeals Chamber, Situation in the Democratic Republic of the Congo, Judgement on victim participation in the investigation stage of the proceedings in the appeal of the OPCD against the decision of Pre-Trial Chamber I of 7 December 2007 and in the appeals of the OPCD and the Prosecutor against the decision of Pre-Trial Chamber I of 24 December 2007 of 19 December 2008, Case No. ICC-01/04 OA4 OA 5 OA 6.

[613] As envisaged by Art. 68(3) of the ICC Statute; see more generally below Chapter "Trial".

[614] See PTC I, **Situation in the Democratic Republic of the Congo**, Decision on the applications for participation in the proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6 of 17 January 2006, Case No. ICC-01/04, para. 63.

Second, when evaluating whether each applicant had victim status, the Pre-Trial Chamber interpreted Rule 85 and identified four requirements: (a) the applicants must be natural persons; (b) they must have suffered harm; (c) the crimes alleged by the applicants must fall within the jurisdiction of the ICC and (d) there must be a causal link between the alleged crimes and the harm suffered by the applicants. As for the examination standard to be adopted, the Pre-Trial Chamber set a relatively low threshold: the 'grounds to believe criterion'.[615] Accordingly, it must be established whether, in the DRC situation, there were "grounds to believe" that the applicants in fact met the aforementioned requirements. In order to make this determination, the Pre-Trial Chamber examined the statements of the applicants and took the arguments of the parties into consideration.

Subsequently, in order to assess the *prima facie* credibility of the applicants' submissions, the PTC verified whether the applicants' accounts of the events were consistent with official reports, namely those of the United Nations.[616] It is clear at this point, that there may be objections regarding the PTC potentially taking over investigative responsibilities. However, these have been outlined above and shall not be repeated here.

But the PTC was rather vague when applying the elements of Art. 68 and Rule 85, a fact which can also be problematic. The Chamber stated that "the personal interests of victims are affected in general at the investigation stage, since the participation of victims at this stage can serve to clarify the facts, to punish the perpetrators and to solicit reparations for the harm suffered". In applying Rule 85, the Chamber also did not clarify what exactly can constitute "harm" or what the preconditions are for a causal link to be established. In setting a very low evidentiary threshold for these elements, the Chamber did not deem it necessary to clarify exactly the preconditions of Art. 68 (3) and Rule 85. This may induce uncertainty and lead to increased early participation for victims that will nevertheless be discontinued later on, thus eventually harming rather then benefiting victims.

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[615] See PTC I, **Situation in the Democratic Republic of the Congo**, Decision on the applications for participation in the proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6 of 17 January 2006, Case No. ICC-01/04, paras. 37 et seq.

[616] See PTC I, **Situation in the Democratic Republic of the Congo**, Decision on the applications for participation in the proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6 of 17 January 2006, Case No. ICC-01/04, paras. 37 et seq.

Of course at such an early point the Chamber does not possess sufficient information to go into more depth. Even if it does conduct certain investigative activities, the information it obtains will still be limited, especially if the investigative activity is constricted to reports and it cannot do "field work". Still, it should be considered whether more legal certainty would not be beneficial for all participants.

3. The modalities of participation

The modalities of participation are, as stated before, decisive for the question whether participation is possible in the investigative phase without affecting the rights of the accused.

In this regard the PTC has decided to appoint an *ad hoc* counsel to represent the interests of the Defence.[617] It was then specified that notwithstanding any specific proceedings being conducted in the framework of the investigation, persons accorded the status of victims will be allowed to be heard by the Chamber in order to present their views and concerns and to file documents pertaining to the current investigation of the situation in the DRC.

With regard to specific proceedings relating to the investigation of the DRC situation, the Chamber has identified three scenarios. First, when specific proceedings were initiated *propriu motu* by the Pre-Trial Chamber under Art. 56(3) and Art. 57 (3)(c) of the Statute, the Chamber would decide at the time of initiation of such proceedings whether persons with victim status might participate in them. In reaching such a decision, the Chamber will take into account the impact that such specific proceedings could have on their personal interests.

Second, when specific proceedings were initiated by the OTP or by counsel representing the general interests of the Defence, the Chamber would make a distinction between proceedings that must be conducted confidentially or in closed session and public proceedings. In the latter case, persons with victim status would be entitled to participate

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[617] See PTC I, **Situation in the Democratic Republic of the Congo**, Decision on the applications for participation in the proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6 of 17 January 2006, Case No. ICC-01/04, para. 64.

unless the Chamber decided otherwise after determining the impact that such proceedings might have on their personal interests. In the case of other specific proceedings that must remain confidential, persons with victim status would not be entitled to participate unless the Chamber decided otherwise in the light of the impact of such proceedings on their personal interests.

Third, victims would also be entitled to request the Pre-Trial Chamber, pursuant to Art. 68(3) of the Statute, to order specific proceedings. Furthermore, pursuant to Rule 92(5), applicants are entitled to be notified of proceedings before the Court.[618] Important factors with regard to the rights of the accused are that victims are in principle not allowed to participate in closed sessions and that they may not have access to the investigations files.

It will be interesting to see in the future how many exceptions will be made to the principle of not allowing participation in closed sessions and how such exceptions are justified. Furthermore, the Chamber should specify what is meant by "other specific proceedings" in which victims may participate in exceptional circumstances. Failing to clarify such terms gives rise to uncertainties for all parties.

Altogether the modalities provided for by the Court show that participation at this stage will be limited which is a concession to the Prosecution.

It remains to be seen how much such restrictions impinge on the possibility to participate early in the proceedings.

IV. Conclusion

As seen above, the Rome Statute does not provide for a real right for victims to start proceedings, they only have limited participatory rights to influence the initiation of investigations. As for participation in the investigative proceedings the ICC has –perhaps for some surprisingly – accorded relatively wide participatory rights. It may be seen as a

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[618] See PTC I, **Situation in the Democratic Republic of the Congo**, Decision on the applications for participation in the proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6 of 17 January 2006, Case No. ICC-01/04, paras 72 et seq.

demonstration that the Court is willing to empower and provide victims with a voice[619] if one sets aside the suspicion that interests other than those of the victims may have played a part.

It has been shown that the rights awarded to victims are also problematic both for the victims as well as for other participant to the proceedings. The ICC will have to deal with these problems in the future. Furthermore the jurisprudence will have to be watched closely because it seems that the wide interpretations of the first decisions might be reversed.

C. Pre-trial

The procedural rules of the ICC do not provide for a formal separation of the investigations up to the point delineated before and the rest of the pre-trial proceedings. However, it seems that as soon as the investigation has reached, according to the Prosecutor, a sufficient condition of "ripeness", a warrant of arrest[620], or a summons to appear, having been issued by the PTC and the accused having surrendered to or appeared before the Court, the pre-trial phase "*strictu sensu*" begins.[621]

I. The pre-trial procedure

The Court shall[622] according to Art. 19 satisfy itself that it has jurisdiction in any case brought before it. According to Art. 19(4) a challenge to its jurisdiction shall take place prior to or at the commencement of the trial". Given that the Prosecutor can "seek a ruling

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[619] Similarly see **Henzelin**, **M.**, **V. Heiskanen**, et al. (2006). "Reparations to Victims before the International Criminal Court: Lessons from International Mass Claims Processes." Criminal Law Forum **17**: 317-344. pp 17 et seq.

[620] See Art. 58.

[621] **Marchesiello**, **M.** (2002). Proceedings before the Pre-Trial Chambers. The Rome Statute of the International Criminal Court: A Commentary. A. Cassese, P. Gaeta and J. R. W. D. Jones. Oxford, Oxford University Press. **2:** 1231-1246. at page 1239; similarly **Ambos**, **K.** (2006). Internationales Strafrecht. München, C. H. Beck Verlag. At page 269; see also **Olasolo**, **H.** (2005). "Reflections on the International Criminal Court's jurisdictional reach." Criminal Law Forum **16**: 279-301. At page 284.

[622] From the wording "shall" it seems that there is an obligation to determine the admissibility of the case.

from the Court regarding a question of jurisdiction or admissibility" at the earliest possible stage including an investigation and that States must make challenges to jurisdiction or admissibility "at the earliest opportunity", the Court may, for reasons of judicial economy, and as part of its inherent power to control the proceedings, require that all challenges to jurisdiction be heard at the same time.[623]

The Court may on its own motion determine the admissibility of a case. Apart from this, challenges to a case's admissibility may be made by the accused or a person for whom a warrant of arrest or summons to appear has been issued or a State.[624] The right of the Prosecutor to "seek a ruling from the Court regarding a question of jurisdiction or admissibility"[625] permits the Prosecutor to obtain a prompt ruling from the Court on these questions at any stage, whether the question relates to an entire situation or to an individual case.[626]

Subsequently, according to Art. 61 at the "confirmation hearing" the Pre-Trial Chamber shall hold a hearing to confirm the charges on which the Prosecutor intends to seek trial which shall in principle be held in the presence of the Prosecutor and the person charged, as well as his or her counsel.

II. Participation according to Art. 19

As already stated, Art. 19 allows for the involvement of victims at the stage where a "case" has been brought before the Court. According to Art. 19(3) victims may participate in the proceedings on jurisdiction or admissibility by submitting observations. The right of victims to submit observations to the Court is designed to ensure that all relevant

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[623] **Hall**, **C. K.** (1999). Art. 19 Challenges to the jurisdiction of the Court or the admissibility of the case. Commentary on the Rome Statute of the International Criminal Court. Observers' Notes, Article by Article. O. Triffterer. Baden Baden, Nomos Verlagsgesellschaft. At page 412.

[624] See Art. 19(2)(b), (c).

[625] See Art. 19(3).

[626] See **Hall**, **C. K.** (1999). Art. 19 Challenges to the jurisdiction of the Court or the admissibility of the case. Commentary on the Rome Statute of the International Criminal Court. Observers' Notes, Article by Article. O. Triffterer. Baden Baden, Nomos Verlagsgesellschaft. At page 411.

points of view are put forward in such proceedings.[627] This possibility of influencing the outcome of the decision is important, because the proceedings could otherwise be concluded without the victims having any influence over its course. The observations of victims may also be important for the proceedings as they will provide information directly from the country concerned.[628]

These possibilities could, of course, be limited, if "observations" are confined to written statements. However, nothing in the final version of Art. 19(3) limits such observations to written form, so that the Court appears to be free to permit oral interventions.[629]

As already stated, the term "observations" typically refers to written as well as oral participation.[630] The only Rule that indicates any restriction to written participation is Rule 59(3) which, however, speaks of "representations".

From Regulation 38 it can be seen that written observations are certainly envisioned for by the rule as it provides that they are subject to a page limit of 50 pages.

As with Art. 15 it seems, that Art. 19 being located in Part 2 of the Statute seems to attribute participatory rights to victims independently of the making of a formal application under Rule 89.[631]

According to Rule 59 para. 1 (b) the Registry shall, in a similar manner as under Art. 15, inform those victims who have already communicated[632] with the Court in relation to the

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[627] Ibid. At page 411.

[628] Similar see **Stahn**, **C.**, **H. Olasolo**, et al. (2006). "Participation of Victims in Pre-Trial Proceedings of the ICC." Journal of International Criminal Justice **4**(1): 219-238. At page 226.

[629] **Hall**, **C. K.** (1999). Art. 19 Challenges to the jurisdiction of the Court or the admissibility of the case. Commentary on the Rome Statute of the International Criminal Court. Observers' Notes, Article by Article. O. Triffterer. Baden Baden, Nomos Verlagsgesellschaft. At page 411.

[630] See for instance Rule 91(2) last sentence.

[631] See **Stahn**, **C.**, **H. Olasolo**, et al. (2006). "Participation of Victims in Pre-Trial Proceedings of the ICC." Journal of International Criminal Justice **4**(1): 219-238. At page 225; See also **Guhr, A.H.** "Victim participation during the pre-trial stage at the International Criminal Court." International Criminal Law Review **8** (2008): pp. 109-140. At page 111.

[632] Rule 50 speaks of „known" thereby giving an even wider term.

case or their legal representative. Here, again, notification of the proceedings is a necessary factual precondition for participation. If victims are not being informed they may not know of the possibility to take part and their interest to see the case tried may nonetheless be effected. Notification is, however, not a formal condition for making a request as it is only intended to provide an opportunity for victims.[633] Victims should be notified sufficiently in advance of Art. 19 proceedings and of the possibility of making observations as determined by the Court so that they can prepare themselves in an effective way.

It should also be sufficient that victims have communicated with the Registry or the OTP for the purposes of deciding whether a person has „communicated with the Court", as these bodies are included in the notion of "Court".[634] Furthermore, in contrast to being "known" by the Court, the verb "communicated" suggests that a more active behaviour is needed, showing the victims interest in the respective proceeding.

Victims who have not communicated with the Court before are not being mentioned in Rule 59 and will hence not be notified.

In contrast to Rule 50, Rule 59 does not provide for the possibility to give notice by general means. During the Preparatory Commissions such a notification by general means was recommended, the stage at which Art. 19(3) takes effect being evaluated as not in itself likely to be as sensitive an issue as at the stage of the Article 15 *ex parte* hearing.[635]

Of course one can on the other hand argue that, especially at a more advanced stage of the proceedings, victim participation can be expected even more then when Art. 15 is

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[633] See above, Chapter on Art. 15; see similarly **Bitti**, **G.** and **H. Friman** (2001). Participation of Victims in the Proceedings. The International Criminal Court, Elements of Crimes and Rules of Procedure and Evidence. R. S. Lee. Ardsley, New York, Transnational Publishers**:** 456-474. At page 470.

[634] See Art. 34.

[635] See Human Rights Watch. Commentary to the third Preparatory Commission Meeting on the International Criminal Court, at http://www.iccnow.org/documents/prepcom/papersonprepcomissues/HRWComment3rdPrepComNov99.pdf.

applicable. Furthermore it should not be forgotten that notifying a large number of victims throughout the whole proceedings could easily overwhelm the Registry with a volume of work that it cannot handle. The latter argument only holds true, however, if there is effective outreach so that victims do have the chance to act on the basis of comprehensive knowledge.

According to Rule 59 responsibility for notification lies with the Registry as central organ of communication.[636] In order to assist the Registrar in this task, a special register for victims should be kept according to Rule 16(3).

One may question whether the Registry will also inform those persons who have been found not to be victims of the case because of an earlier application. On the one hand one could argue that it has already been ascertained that they are not "victims" and Art. 19, even if it does not require an application, still only gives a right to "victims". However, even if victims were deemed not to be victims of the case, for Art. 68 proceedings they can always apply afresh, all the more under Art. 19 that does not require an application, victims that have already participated should have the same possibilities as victims that have not yet participated.

There is no remedy for cases where the Registry does not fulfil its duty to notify.

Furthermore the Pre-Trial Chamber can still resort to Rule 93 to seek the views of "victims of the situation" in this context. The Pre-Trial Chamber may wish to use Rule 93 to obtain information from "victims of the situation" in order to get a real sense, for example, of whether a case is of "sufficient gravity to justify further action by the Court", pursuant to Article 17(1)(d).[637]

According to Art. 19 para. 10 if the Court has decided that a case is inadmissible under Art. 17, the Prosecutor may submit a request for a review of the decision when he or she

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[636] Unlike in Art. 15(3) where the Prosecutor is responsible because at such an early stage of the proceedings the Registry does not possess all information necessary.

[637] See **Stahn**, **C.**, **H. Olasolo**, et al. (2006). "Participation of Victims in Pre-Trial Proceedings of the ICC." Journal of International Criminal Justice **4**(1): 219-238. At pp. 231, 232.

is fully satisfied that new facts have come to light which negate the basis on which the case had previously been found inadmissible under Art. 17. The possibility of this type of review does not exist for victims. However, as shown before victims have the possibility to participate in the review proceedings.[638]

Furthermore, decisions with respect to jurisdiction or admissibility may, according to Art. 19 (6), be appealed in accordance with Art. 82 which refers to the "parties" thereby preventing victims from initiating the appeal procedure. Victims may, however, participate in the appeal proceedings and shall be informed of such proceedings.[639]

III. Participation in Status Conferences

According to Rule 121 (2)(b) the Pre-Trial Chamber shall hold status conferences to ensure that disclosure takes place under satisfactory conditions. For each case, a judge of the Pre-Trial Chamber shall be appointed to organize such status conferences, on his or her own motion, or at the request of the Prosecutor or the person in respect of whom a warrant of arrest or a summons to appear has been issued. Victims thus do not have the possibility to request a status conference.

The participation of victims in the status conferences of 24 August and 5 September 2006 was rejected before the ICC [640] but only because the manner of participation of the victims in the case remained to be determined. This, therefore did not rule out the possibility of participating in a status conference completely.

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[638] See above Chapter on Art. 15.

[639] See **Aldana-Pindell**, **R.** (2004). "An Emerging Universality of the Justiciable Victims' Rights to the Criminal Process to Curtail Impunity for State-Sponsored Crimes." Human Rights Quarterly **26**: 605-686. At page 661.

[640] See PTC I, Situation en République démocratique du Congo **Prosecutor c. Thomas Lubanga Dyilo,** Décision relative à la demande de participation des victimes a/0001/06 à a/0003/06 à la conférence de mise en état du 24 août 2006 du 17 August 2006, Case No. ICC-01/04-01/06-335, at page 3; PTC I, Situation in the Democratic Republic of the Congo **the Prosecutor vs. Thomas Lubanga,** Decision on the application for participation of victims a/0001/06 to a/0003/06 in the status conference of 5 September 2006 of 4 September 2006, Case No. ICC-01/04-01/06-380-tEN.

A decision of 22. September settled the manner of participation [641] and allowed for the participation in status conferences in the sense of attending the status conferences or the parts of these conferences which are to be held in public.[642]

IV. Participation in the confirmation hearings according to Art. 61

According to Art. 61 "within a reasonable time after the person's surrender or voluntary appearance before the Court, the Pre-Trial Chamber shall hold a hearing to confirm the charges on which the Prosecutor intends to seek trial."

According to Art. 61(5), at the hearing the Prosecutor shall support each charge with sufficient evidence to establish substantial grounds to believe that the person committed the crime with which he or she is charged. The Prosecutor may rely on documentary or summary evidence and need not call the witnesses who are expected to testify at the trial.

In the Art. 61 hearing the Prosecutor and the Defence may present evidence or challenge the evidence presented[643] whereupon the PTC determines whether there is sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes charged.[644] If the charges are confirmed, the Presidency of the Court will constitute a Trial Chamber responsible for subsequent hearings.

The confirmation thus represents an important part of the proceedings, where decisions may be arrived that are important for the progress and the scope of the proceedings. It seems important that there is a chance of participation in these proceedings, but from the wording of Art. 61 it does not seem evident that such a chance exists.

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[641] See Situation in the Democratic Republic of the Congo **the Prosecutor vs. Thomas Lubanga,** Decision on the Arrangements for participation of Victims a/0001/06, a/0002/06 and a/0003/06 at the Confirmation hearing of 22 September 2006, Case No. ICC-01/04-01/06-462-tEN.

[642] See Situation in the Democratic Republic of the Congo **the Prosecutor vs. Thomas Lubanga,** Decision on the Arrangements for participation of Victims a/0001/06, a/0002/06 and a/0003/06 at the Confirmation hearing of 22 September 2006, Case No. ICC-01/04-01/06-462-tEN, at page 8.

[643] See Art. 61(6), (7).

[644] See Art. 61, (7).

According to Rule 92(3), the Court shall notify victims of its decision to hold a hearing to confirm charges pursuant to Art. 61. Such notification shall be given to victims or their legal representatives who have already participated in the proceedings or, as far as possible, to those who have communicated[645] with the Court in respect of the case in question. With respect to notice of the confirmation hearing, Rule 92(8) explicitly directs the Registrar to take necessary measures to give "adequate publicity" to the proceedings, which could also include notification by means of general notice. This is fully in line with other rules by which the Pre-Trial Chamber is obliged to ensure that the date of that hearing and any postponement is made public. According to sub-rule 8, the Registrar may seek the cooperation of state-parties and the assistance of intergovernmental organizations in relation to the notifications.

It has been deduced from Art. 61 and the requirement to notify victims that victims are allowed to participate under this provision after having made an application under Rule 89.[646]

However, this conclusion can be doubted insofar as the Statute provides for clear participatory rights in other provisions, but in Art. 61 there is no indication to that it was intended to create participatory rights. Furthermore, such an interpretation of Art. 61 seems unnecessary, considering Art. 68 which provides for clear participatory rights, has been said to be applicable by the Chamber in the investigations stage.[647]

By now four victims have participated through their legal representatives in the confirmation of charges hearing in the *Lubanga* case.[648]

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[645] As fort the term „communicated" see above Chapter on Art. 19.

[646] **Stahn**, **C.**, **H. Olasolo**, et al. (2006). "Participation of Victims in Pre-Trial Proceedings of the ICC." Journal of International Criminal Justice **4**(1): 219-238. At page 235.

[647] See above pages 112 et seq.

[648] See Pre Trial Chamber I, Situation in the Democratic Republic of the Congo in **Prosecutor vs. Thomas Lubanga Dyilo,** Decision on the schedule and conduct of the confirmation hearing of 7 November 2007, Case No. ICC-01/04-01/06.

Their participation was limited to an opening and a closing statement, both containing only legal observations, as their request for anonymity did not allow any personal statements, and the presentation of facts other than those put forward by the Prosecutor would have resulted in anonymous accusations.[649]

Pre Trial Chamber I ordered that the victims should only have access to the public documents and participate in the public hearings, and that they would not be permitted to add any point of fact or any evidence and to question the witnesses.[650] However, on November 21 2006, the legal representative of victims a/0001/06 to a/0003/06 requested leave to put one question to the sole witness called by the prosecution. Following submissions from the parties, this request was granted.[651]

If the purpose of victim participation is to give victims a voice and the possibility of telling their story, purely legal representations will not fulfill that purpose. Views of a more personal nature would be needed.

V. Participation according to Art. 68

Victims could participate in the pre-trial proceedings according to Art. 68(3) provided that Art. 68 is applicable to this stage of the proceedings.

The hearings under Art. 61 can be seen as the first parts of the Court proceedings.[652] At least the stage of the investigation of the situation is completed by the issuing of an arrest

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[649] See Situation in the Democratic Republic of the Congo, **the Prosecutor vs. Thomas Lubanga,** Decision on the Arrangements for participation of Victims a/0001/06, a/0002/06 and a/0003/06 at the Confirmation hearing of 22 September 2006, Case No. ICC-01/04-01/06-462-tEN.

[650] See Situation in the Democratic Republic of the Congo, **the Prosecutor vs. Thomas Lubanga,** Decision on the Arrangements for participation of Victims a/0001/06, a/0002/06 and a/0003/06 at the Confirmation hearing of 22 September 2006, Case No. ICC-01/04-01/06-462-tEN, pages 6/7.

[651] See Pre Trial Chamber I, Situation in the Democratic Republic of the Congo in **Prosecutor vs. Thomas Lubanga Dyilo,** Decision on the schedule and conduct of the confirmation hearing of 7 November 2007, Case No. ICC-01/04-01/06, pages 95 and 141.

[652] See **Leiss**, **M.** (2003). Internationaler Strafgerichtshof und Jugoslawientribunal. Münster, LIT Verlag. At page 57.

warrant. From the wording, Art. 68(3) seems applicable as the pre-trial proceedings stage is now reached.

Indeed Art. 61 is to be found in Part 5 "Investigation and Prosecution", while Art. 68 belongs to Part 6 of the Statute, on the Trial. The title of Art. 68, however, which makes general reference to "the proceedings" and its content reflect its wider applications to all stages of the procedure.[653] Indeed, it has repeatedly been held that views and concerns may be put forward at all stages of the Court proceedings.[654]

From a teleological point of view one can see that the arguments put forward against the participation of victims in the stage of investigation of a situation are not valid at the stage of the pre-trial hearings. First of all, this stage deals with concrete cases where it is no longer possible for as many victims to participate as before when it had not yet been decided who an accused person was. The expeditious conduct of the proceedings is therefore not endangered to a larger extent than in the trial proceedings. The integrity and impartiality of the investigations, too, are no longer at risk at this stage of the proceedings as the investigations have already been completed. As to the rights of the accused, it seems that these can be taken into account through the modalities of participation.

Many authors are also of the opinion that participation is possible at this stage of the proceedings under Art. 68.[655]

As for the ICC it has not only been decided that Art. 68 is applicable as early as the investigation stage[656] but that victims may also participate in the confirmation hearing by

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[653] See **Donat-Cattin**, **D.** (2001). The Rights of Victims and International Criminal Justice. International Lawyers as we enter the 21st Century, International Focus Programme 1997-99. E. International. Berlin, Berlin Verlag. At page 289.

[654] See **Nainar**, **V.** (1999). "Giving victims a voice in the International Criminal Court." UN Chronice(4). See also **Bourdon**, **W.** (2000). La Cour pénale internationale: le statut de Rome. Paris, Edition du Seuil. At page 203.

[655] See e.g. **Donat-Cattin**, **D.** (1999). Art. 68 "Protection of victims and witnesses and their participation in the proceedings". Commentary on the Rome Statute of the International Criminal Court.Observers´Notes Article by Article. O. Triffterer. Baden-Baden, Nomos Verlagsgesellschaft. At page 873; **Stehle**, **S.** (2006). Das Strafverfahren als immaterielle Wiedergutmachung. Frankfurt am Main. At page 301; **Friman**, **H.** (2001). The Rules of Procedure and Evidence in the Investigative Stage. International and National Prosecution of Crimes under International Law. H. Fischer, C. Kreß and S. R. Lüder. Berlin, Berliner Wissenschaftsverlag: 212 - 217. At page 216.

presenting their views and concerns to contribute to the prosecution of the crimes from which they allegedly have suffered and, where relevant, subsequently to be able to obtain reparations for the harm suffered.[657]

1. Who may participate

Victims must make an application to participate under Art. 68[658] and have to show a personal interest. It is, however, clear that victims have an interest in being involved in the confirmation hearing for several reasons. They may, for example, have an interest in requesting measures for the purpose of forfeiture pursuant to Art. 57(3)(e). Victims may also have an interest in the framing of the indictment and in the formulation of the precise charges against a particular accused.

Apart from this, the Pre-Trial Chamber can resort to Rule 93 to seek the views of victims in relation to the confirmation hearing.

As for victims who have already been accorded this status in the investigations, once an arrest warrant has been issued and a case proceeds from the investigation, the Chamber will automatically address the question of whether the applicants meet the definition set out in Rule 85 in connection with the case.[659] Applicants that have been granted victim status with respect to the investigation stage before issuance of an arrest warrant must then demonstrate that a sufficient causal link exists between the harm they have suffered and the crimes for which there are reasonable grounds to believe that the accused has committed them. They have to demonstrate that the precise accused bears criminal

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[656] See above chapter investigation.

[657] See Situation in the Democratic Republic of the Congo **the Prosecutor vs. Thomas Lubanga,** Decision on the Arrangements for participation of Victims a/0001/06, a/0002/06 and a/0003/06 at the Confirmation hearing of 22 September 2006, Case No. ICC-01/04-01/06-462-tEN.

[658] As to the requirements of the application and application according to Art. 68 in general see below chapter onus of proof .

[659] See PTC I, **Situation in the Democratic Republic of the Congo**, Decision on the applications for participation in the proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6 of 17 January 2006, Case No. ICC-01/04, para. 68; see also PTC I, Situation in the Democratic Republic of the Congo in **Prosecutor v. Thomas Lubanga Dyilo,** Decision on the Applications for participation in the proceedings submitted by VPRS 1 to VPRS 6 in the Case the Prosecutor v. Thomas Lubanga Dyilo of 29 June 2006, Case No. ICC-01/04-01/06-172-tEN, page 6.

responsibility for the harm and has imposed it with the crimes for which the Chamber has issued an arrest warrant.

In the above mentioned case six persons were accorded the rights of victims in the stage of investigation of a situation[660], after the arrest warrant was issued the Pre-Trial Chamber decided in three of the six cases that there was no sufficient causal link to the case and in the other three cases that no sufficient evidence had been provided to allow the Chamber to consider that there were reasonable grounds for believing that the harm they had suffered was directly linked to the crimes contained in the arrest warrant.[661] As outlined above, the danger of "being thrown out" of the proceedings did materialise in this case.

The fact that the arrest warrant was expressed very narrowly[662] and that the charges could have been broader than those mentioned in the arrest warrant[663] might have contributed to this outcome. It seems that the victims, through their participation in the investigations had had no influence on the content of the arrest warrant. The Chamber thus decided they

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[660] See above.

[661] See PTC I, Situation in the Democratic Republic of the Congo in **Prosecutor v. Thomas Lubanga Dyilo,** Decision on the Applications for participation in the proceedings submitted by VPRS 1 to VPRS 6 in the Case the Prosecutor v. Thomas Lubanga Dyilo of 29 June 2006, Case No. ICC-01/04-01/06-172-tEN, at page 8.

[662] In a Joint letter to the Chief Prosecutor of the International Criminal Court of July 31, 2006 some very influential NGOs (Avocats Sans Frontières, Center for Justice and Reconciliation, Coalition Nationale pour la Cour Pénale Internationale – RCD, Fédération Internationale des Ligues des Droits de l'Homme, Human Rights Watch, International Center for Transitional Justice, Redress and Women's Initiatives for Gender Justice) have expressed their concern as to the limited range of the charges despite a strong evidentiary basis for the possible existence of other crimes. It has been said that a wider range of charges was crucial for the victims of these crimes and for ending the culture of impunity in the DRC and in the Great Lakes region and that the failure to include additional charges in the case against Mr. Lubanga could undercut the credibility of the ICC in the DRC. Moreover, the narrow scope of the current charges might result in severely limiting victims' participation in the first proceedings before the ICC. This could also negatively impact on the right of victims to reparations. Concerns as to the understaffing of the DRC investigation and prosecution teams were further expressed, saying it was crucial that the OTP deployed sufficiently sized investigative teams at the earliest possible opportunity once the security situation improved to work efficiently and effectively.

[663] See Legal representative of victims, Situation en république démocratique du Congo Le **Procureur c. Thomas Lubanga Dyilo**, Observations du Représentant légal des victimes VPRS 1 à 6 suite aux observations du Procureur et du Conseil de la défense, au sujet du statut de victime de demandeurs VPRS 1 à VPRS 6 dans le cadre de l'affaire „Le Procureur c. Thomas Lubanga Dyilo" of 31 May 2006, Case No. ICC-01/04-01/06-132 at page 4.

had no other option than to apply to participate afresh every time the arrest warrant is being amended. The Court did not consent to the demand of the victims' legal representative to delay the decision on the applicants' being victims in the sense of Rule 85 until the confirmation of charges according to Art. 61 had taken part.[664]

This system of "on again, off again" participation may not only be unhelpful for the psychological well-being of the victims and their personal safety, but may also hinder the expeditious conduct of the proceedings.

Still, the decision of the PTC may be understandable at this point of time. In the opinion of the author, there is already a problem at the point where victims are admitted to the investigations without having any *de facto* means of influencing either the choice of who will be accused or how broad the charges will be. One may also question the very narrow scope of the charges submitted by the Prosecutor.

Of course the victims, who are still "victims of the situation", do have the chance to further participate in the investigations if they are continued.[665] Still this procedure might be confusing and discouraging to the victims.

2. Conditions accorded to participation

As already mentioned, a precondition to participation according to Art. 68 is proof of victimhood and a personal interest.[666] It is questionable how substantiate such proof must

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[664] See PTC I, Situation in the Democratic Republic of the Congo in **Prosecutor v. Thomas Lubanga Dyilo,** Decision on the Applications for participation in the proceedings submitted by VPRS 1 to VPRS 6 in the Case the Prosecutor v. Thomas Lubanga Dyilo of 29 June 2006, Case No. ICC-01/04-01/06-172-tEN, at page 8.

[665] See thereto Prosecutor, in the Democratic Republic of the Congo in **Prosecutor v. Thomas Lubanga Dyilo,** Prosecutor`s information on further investigation of 28 June 2006, Case No. ICC-01/04-01/06-170, paras. 7 et seq. where it is stated that the investigations will be temporarily suspended while it was emphasized that this decision did not exclude that the Prosecutor might continue investigations into crimes allegedly committed by Thomas Lubanga Dyilo after the close of the present proceedings.

[666] As to a more comprehensive analysis of this term, see below pages 142.

be adduced at this point of the proceedings. The evidentiary standard has already been found to be relatively low at the investigatory stage.[667]

Pre-Trial Chamber I has stated that as soon as a warrant of arrest is issued, the examination criterion is more restrictive. Thus, according to Art. 58(1)(a) of the Statute, the Chamber should issue a warrant of arrest if it is satisfied that "[t]here are reasonable grounds to believe" that the person concerned has committed a crime. Similarly, at the stage of confirmation of the charges, the criterion under Art. 61(7) of the Statute for determining whether the charges should be confirmed is even more restrictive.[668] It is just as well that with regard to Rule 85 it has been decided that at this stage of the proceedings, the causation requirement under the Rule was satisfied where the victim and, as the case may be, the immediate family or the dependents of the direct victim, provide sufficient evidence to show that there were "reasonable grounds to believe" that he or she had suffered harm directly linked to the crimes set forth in the warrant of arrest, or that he or she had suffered harm in intervening to assist direct victims in the case, or to prevent their victimisation as a result of the commission of these crimes.[669] The same will most probably apply to the "personal interest" criterion.

3. Modalities and extent of participation according to Art. 68

Due to the different purpose and focus of the pre-trial proceedings respectively the confirmation hearing as in comparison to the Trial proceedings, it seems likely that victim participation will be adapted to the necessities of the confirmation hearing.

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[667] See above at pages 116 et seq.

[668] Prosecutor, in the Democratic Republic of the Congo in **Prosecutor v. Thomas Lubanga Dyilo,** Prosecutor`s information on further investigation of 28 June 2006, Case No. ICC-01/04-01/06-170, paras. 7 et seq. where it is stated that the investigations will be temporarily suspended while it was emphasized that this decision did not exclude that the Prosecutor might continue investigations into crimes allegedly committed by Thomas Lubanga Dyilo after the close of the present proceedings, para. 98.

[669] See PTC I, Situation in the Democratic Republic of the Congo in **Prosecutor vs. Thomas Lubanga Dyilo,** Decision on applications for participation in proceedings a/0004/06 to a/0009/06, a/0016/06, a/0063/06, a/0071/06 to a/0060/06 and a/0105/06 in the case *The Prosecutor vs. Thomas Lubanga* Dyilo of 20 October 2006, Case No. ICC-01/04-01/06-601-tEN, at page 9.

In the confirmation hearings the PTC is not charged with determining the guilt of the accused, rather its role is to decide whether or not to confirm the charges. The mode and extent of victim participation may therefore differ as between the confirmation hearing and the trial.

In general terms, the modalities of participation should be the same as in the Trial proceedings[670], whereas, as already said the extent may differ due to the different purpose and focus of the pre-trial procedure.

It seems that a decisive factor in determining the modalities and extent of the participation are the protective measures afforded to victims. In the first case dealing with this issue, the Legal Representatives of the victims had requested authorization to put questions to Thomas Lubanga Dyilo during the confirmation hearing and to make oral opening and closing statements.[671] The prosecution had opposed this request by referring to the rights of the accused which would be impinged upon if the victims were awarded overly broad rights at this early stage of the proceedings while maintaining their anonymity.[672]

In a decision of 22 September 2006, the PTC defined the modalities for victim participation in relation to their compatibility with anonymity.

The Chamber first of all considered that in the circumstances of the case, victims could only effectively participate if their anonymity was preserved.

To reconcile their anonymity with the rights of the accused[673] the PTC considered that in principle, the anonymous participation of victims at this stage of proceedings should be

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[670] In more detail see below.

[671] See Prosecutor, Situation in the Democratic Republic of the Congo **Prosecutor vs. Thomas Lubanga Dyilo,** Prosecution's Response to "Observations concernant les modalités de la participation des Victimes" of 25 August 2006, Case No. ICC-01/04-01/06-353, paras. 9 et seq.

[672] See Prosecutor, Situation in the Democratic Republic of the Congo **Prosecutor vs. Thomas Lubanga Dyilo,** Prosecution's Response to "Observations concernant les modalités de la participation des Victimes" of 25 August 2006, Case No. ICC-01/04-01/06-353, paras. 9 et seq.

[673] The Chamber considered that otherwise the fundamental principle prohibiting anonymous accusations would be violated.

limited to i) access to public documents only and ii) presence at public hearings only. This would retain the option of making an exception to this principle in "exceptional circumstances". The main types of participation envisaged by the PTC were the making of opening and closing statements at hearings to which victims were invited and requesting leave to intervene during the public session of the confirmation hearing in which the Chamber would rule on a case-by-case basis and on the basis of principles established in the decision.

Victims were not allowed to add any points of fact or any evidence at all to the Prosecution's case-file presented against the accused in the notifications of charges document and the list of evidence; and, in the opinion of the Chamber, victims would therefore not be able to question witnesses according to the procedure set out in Rule 91(3). Victims would furthermore receive notification only of the public documents contained in the record of the case.

The Legal Representatives of the Victims could , in the opening and closing statements, *inter alia*, address points of law, including the legal characterisation of the modes of liability with which the Prosecution had charged Thomas Lubanga Dyilo under Art. 25 of the Statute.[674]

The Chamber stated that only if the victims agreed to the disclosure of their identities to the Defence, would the Chamber examine the issue of determining whether they could be granted leave to participate in another manner in the proceedings before the PTC. [675]

Thus, the participation of victims in the pre-trial proceedings is or at least can be very limited. It is therefore questionable as to whether victims have sufficient means to effectively participate.

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[674] See Situation in the Democratic Republic of the Congo **the Prosecutor vs. Thomas Lubanga,** Decision on the Arrangements for participation of Victims a/0001/06, a/0002/06 and a/0003/06 at the Confirmation hearing of 22 September 2006, Case No. ICC-01/04-01/06-462-tEN, pp. 6 et seq.

[675] See Situation in the Democratic Republic of the Congo **the Prosecutor vs. Thomas Lubanga,** Decision on the Arrangements for participation of Victims a/0001/06, a/0002/06 and a/0003/06 at the Confirmation hearing of 22 September 2006, Case No. ICC-01/04-01/06-462-tEN, pp. 6 et seq.

Providing victims with the protective measure of anonymity alone can be seen as a measure that has been very contested before the ICTY and may also be before the ICC.

Only in one decision in the *Tadić* case has a Trial Chamber of the ICTY granted complete anonymity for a witness[676] during trial. Of course, a victim does not have the same status in the proceedings as a witness, still, similar problems might have led to the decisions.

In the *Tadić* case, a decision of 10 August 1995, to which Judge Stephen gave a separate opinion, anonymity was granted to a witness.[677] This decision has been hotly contested[678] and it has been suggested that the question of anonymity which is left open in the Rome State, will also be contested there.

The question of whether anonymity will or should be applicable will not be discussed here. However, it seems important to highlight that one of the decisive factors in the *Tadić* decision was that while a conflict was still ongoing the Tribunal could not operate an effective protection program that extended across national boundaries to the many places where victims and witnesses were located.[679] The Victims and Witnesses Unit had very limited resources and could offer only minimal counselling and protection to witnesses

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[676] As to the differences between witnesses and victims see above.

[677] **Prosecutor vs. Tadić,** Decision on the Prosecutor´s Motion requesting protective measures for victims and witnesses, Case No. IT-94-1-T, Trial Chamber II, 10 August 1995, paras. 17-30.

[678] Concerning this topic see for example **Leigh**, **M.** (1996). "The Yugoslav Tribunal: Use of Unnamed Witnesses against Accused." American Journal of International Law **90**: 235-238.; **Scharf**, **M. P.** and **V. Epps** (1996). "The International Trial of the Century? A "Cross-Fire" Exchange on the First Case Before the Yugoslav War Crimes Tribunal." Cornell International Law Journal **29**: 635-663.; **Sluiter**, **G.** (2002). International Adjucation and the Collection of Evidence. New York. At page 246; **Affolder**, **N.** (1998). "Tadic, The Anonymous Witness and the sources of international procedural law." Michigan Journal of International Law **19**: 445-495, **Mumba**, **F.** (2001). Ensuring a Fair Trial whilst Protecting Victims and Witnesses- Balances of Interests ? Essays on ICTY Procedure and Evidence in Honour of Gabrielle Kirk McDonald. R. May, D. Tolbert, J. Hockinget al. The Hague, Kluwer Law International.page 467; **McDonald**, **A.** (2002). The Role of Victims and Witnesses in International Criminal Trials. Treaty Enforcement and International Cooperation in Criminal Matters with special reference to the Chemical Weapons Convention. R. Yepes-Enriques and L. Tabassi. The Hague, T.M.C. Asser Press**:** 257-276. page 263; **Mohmeni**, **M.** (1997). "Balancing the Procedural Rights of the Accused Against a Mandate to Protect Victims and Witnesses: An Examination of the Anonymity Rules of the International Criminal Tribunal for the Former Yugoslavia." Howard Law Journal **41**: 155-179. and others.

[679] Compare **Doak**, **J.** (2003). "The victim and the Criminal Process: An Analysis of recent trends in Regional and International Tribunals." Legal Studies **23**(1): 1-33. At page 22.

while they were present in The Hague to give evidence.[680] Especially the protection outside the Court and in the post-trial phase, for example relocation of witnesses could only be provided for in very rare cases.[681] Anonymity was thus the only means possible to offer protection but many say it did not constitute an adequate solution as it seriously impacted on the rights of the accused.[682]

The fact that victims are now being granted anonymity before the ICC could be because the ICC does not have enough means to provide for sufficient outside the court protection, even if the Defence has pointed in a rather polemical way that no mention was made regarding a lack of an effective witness protection programme.[683]

It would be no wonder if this were the case, as in comparison to the ICTY, the ICC not only has to protect witnesses but also has a potentially large number of victims participating in their own capacity while the ICC also has to cope with limited resources.[684]

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[680] **Chinkin**, **C.** (1997). "Due Process and Witness Anonymity." American Journal of International Law **90**(75-79). At page 77.

[681] See **Chifflet**, **P.** (2003). The Role and Status of the Victim. International criminal law: developments in the case law of the ICTY. W. A. Schabas and G. Boas. Leiden, Martinus Nijhoff**:** 75-111. At page 89; **Fitzgerald**, **K.** (1997). "Problems Of Prosecution and Adjucation of Rape and Other Sexual Assaults under International Law." European Journal of International Law **8**(4): 638-663. see pages 640, 641;**McDonald**, **A.** (2002). The Role of Victims and Witnesses in International Criminal Trials. Treaty Enforcement and International Cooperation in Criminal Matters with special reference to the Chemical Weapons Convention. R. Yepes-Enriques and L. Tabassi. The Hague, T.M.C. Asser Press**:** 257-276. at page 263; see also **Kim**, **Y. S.** (2003). The International Criminal Court: A Commentary of the Rome Statute. Leeds, Wisdom House. At page 414 reporting the experience that some victims who testified before the ICTR were killed, see also **Donat-Cattin**, **D.** (1999). Art. 68 "Protection of victims and witnesses and their participation in the proceedings". Commentary on the Rome Statute of the International Criminal Court.Observers´ Notes Article by Article. O. Triffterer. Baden-Baden, Nomos Verlagsgesellschaft. At page 871.

[682] **Chifflet**, **P.** (2003). The Role and Status of the Victim. International criminal law: developments in the case law of the ICTY. W. A. Schabas and G. Boas. Leiden, Martinus Nijhoff**:** 75-111. At page 87.

[683] See above Chapter natural persons; see also Defence, Situation in the Democratic Republic of the Congo in **Prosecutor vs. Thomas Lubanga Dyilo,** Defence submissions regarding the applications for participation in the proceedings of applicants a/0004/06 to a/0052/06 of 4 September 2006, para. 5.

[684] Compare for instance **Henzelin**, **M.**, **V. Heiskanen**, et al. (2006). "Reparations to Victims before the International Criminal Court: Lessons from International Mass Claims Processes." Criminal Law Forum **17**: 317-344. At page 317 who points out that for instance in the Darfur conflict, the United Nations estimated there were1.65 million internally displaced persons in Darfur, and more than 200,000 refugees

However, if anonymity becomes the general rule because of a limited protection system it may be doubted whether victims will be able to participate effectively. It may be necessary to limit their participation to protect the rights of the accused. However, if the rights of victims were maintainable with more protection this would be preferable.

VI. Participation in proceedings according to Art. 18

Art. 18 applies only when the Prosecutor is acting in response to a referral by a State Party under Art. 13(a) or when he or she is acting on his or her own initiative under Art. 13(c) or Art. 15. The article does not apply where the Prosecutor is acting in response to a referral by the Security Council.[685]

According to Art. 18(2) the Prosecutor shall defer to a State that has informed him that it is investigating, unless the Pre-Trial Chamber, on the application of the Prosecutor, decides to authorize the investigation.

In Art. 18 victim involvement is not provided for as set out in Arts. 15 and 19.

It has been said that the wording of Art. 19(3) is broad enough to cover proceedings under Art. 18 of the Statute and that in addition, Art. 68(3) and Rule 93 could also serve as a potential basis for victim involvement.[686]

The drafting history of the sections, however, actually indicates that this may not have been intended.[687]

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from Darfur in neighbouring Chad. There has been large-scale destruction of villages throughout the three states of Darfur; as for the financial conditions see **O'Donohue**, **J.** (2005). "The 2005 Budget of the International Criminal Court: Contingency, Insufficient Funding in Key Areas and the Recurring Question of the Independence of the Prosecutor." Leiden Journal of International Law **18**(3): 591-603.

[685] **Ntanda Nsererko**, **D. D.** (1999). Art. 18, Preliminary rulings regarding admissibility. Commentary on the Rome Statute of the International Criminal Court. Observers' Notes, Article by Article. O. Triffterer. Baden Baden, Nomos Verlagsgesellschaft. At page 397.

[686] See **Stahn**, **C.**, **H. Olasolo**, et al. (2006). "Participation of Victims in Pre-Trial Proceedings of the ICC." Journal of International Criminal Justice **4**(1): 219-238. at page 231; see also **Hall**, **C. K.** (1999). Art. 19 Challenges to the jurisdiction of the Court or the admissibility of the case. Commentary on the Rome Statute of the International Criminal Court. Observers' Notes, Article by Article. O. Triffterer. Baden Baden, Nomos Verlagsgesellschaft. At page 407.

Still, the ultimate choice will again lie with the Judges of the Court as to whether victims will be allowed to be involved in this stage of the proceedings. [688]

VII. Conclusion

In summary, victims are awarded limited rights to participate in the Pre-Trial proceedings through Art. 19(3) and Arts. 19(3), 18 and to participate in status conferences. Through Art. 68(3) victims are accorded more comprehensive rights to participate in the pre-trial proceedings, at least at first glance. That these rights might also be rather limited in reality, has been seen by the first decision of the ICC on this topic, which dealt with a situation where victims were participating anonymously. However, the interests of the Prosecution and Defence may well be, that participation in the pre-trial phase might in general be more limited than in the Trial phase.

D. Trial

Once the charges have been confirmed by the Pre-Trial Chamber according to Art. 61(6)(a), (11) the Trial Chamber is responsible for the subsequent proceedings.[689] The trial will be held in public if there are no special circumstances that require a different solution[690] and the Trial Chamber shall ensure that a trial is fair and expeditious and is conducted with full respect for the rights of the accused and due regard for the protection of victims and witnesses.[691]

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[687] **Stahn**, **C.**, **H. Olasolo**, et al. (2006). "Participation of Victims in Pre-Trial Proceedings of the ICC." Journal of International Criminal Justice **4**(1): 219-238.

[688] See also (1999). The International Criminal Court: Ensuring an effective role for victims - Memorandum for the Paris seminar, April 1999, Amnesty International. At pages 14, 15.

[689] According to Art. 64(6)(b) and (d) the Chamber may require the the production of documents and other evidence as well as „rule on any other relevant matters“, see Art. 64(6)(f). The proceedings are led by the Presiding judge, Art. 64(8)(b) only if the Presiding Judge does not give orders under Art. 64(8) the Prosecutor and the Defence shall agree on the order and manner in which the evidence shall be submitted to the Chamber, see Rule 140(1).

[690] See Art. 64(7).

[691] Art. 64(2).

The trial commences with the reading of the charges previously confirmed by the Pre-Trial Chamber to the accused.[692] Unless the accused makes an admission of guilt, the parties will then present evidence according to Art. 69, Rule 140. According to Rule 141 after the submission of evidence has been closed, the Prosecutor and defence are invited to make closing statements. Then, according to Art. 74, Rule 142 the Chamber shall retire to deliberate *in camera* and within a reasonable period of time set a date where it pronounces its decision.

The first trial of the Court has been opened on Monday 26 January 2009.[693]

Art. 68 is the central provision for the participation of victims, that is, participation without necessarily being witnesses. Art. 68(3) is relatively vague and is being shaped by the interpretation of Rules 89-93 RPE.

In interpreting the provisions, recourse must also be taken to the general provisions of Rule 86 which contains a general imperative requirement to be considerate of victims' concerns.

I. Who can participate?

In order to be admitted to participate in the trial, a person must first be a victim in the sense of Rule 85.[694] As stated before, the definition of "victim" remains the same throughout the diverse stages of the proceedings. Only the standard of proof may differ.

Furthermore, according to Art. 68, only those victims whose personal interests are affected can participate.

But which interests will be recognised? This decision is left to the Court and there are different ways in which the wording of "personal interests" can be interpreted.

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[692] Art. 64(8).

[693] See http://www.icc-cpi.int/press/pressreleases/467.html.

[694] Thereto see above pages 65 et seq.

One could take the view that the term “personal interests” has to be interpreted broadly, being conterminous with the definition of “victim” of Rule 85. Since every victim has suffered harm as a result of the commission of a crime under the jurisdiction of the court, personal interest could be seen as implicit in victimhood.[695] Others disagree and argue that the definition in Rule 85 is abstract and that “personal interests“ if understood as being related to the proceedings, do not necessarily correspond with victimhood.[696]

From the author’s point of view, the fact that Art. 68 introduces an additional criterion with the term „personal interests“ indicates that the drafters did not intend victim status and the criteria of personal interest to be conterminous. Art. 68 includes additional criteria in comparison with the abstract victim definition in order to narrow the number of person who can actually participate. As a matter of fact the ICC does not have the resources to let all victims participate in the proceedings.

It is true that the PTC for the stage of investigation of a situation has considered that the personal interests of victims were affected “in general”[697], thereby judging all victims in the sense of Rule 85 as having a personal interest in the matter. However, at the same time the PTC has stated that this general assessment, pertaining to the scope of the application filed with the Court and which relates to the whole of the proceedings before it, does not rule out the possibility of a more specific assessment of victims’ personal interests based on the applications filed by victims in accordance with the modalities of the participation of victims in the proceedings set out below. Where the Chamber was seized, as in the present case, of an application to participate in the remainder of the proceedings to which no application or request for relief was appended: The Chamber had to rule on the request, taking into account the stage of the proceedings at which the application was

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[695] See **Donat-Cattin**, **D.** (1999). Art. 68 "Protection of victims and witnesses and their participation in the proceedings". Commentary on the Rome Statute of the International Criminal Court. Observers´Notes Article by Article. O. Triffterer. Baden-Baden, Nomos Verlagsgesellschaft. At page 879.

[696] **Safferling**, **C. J. M.** (2003). "Das Opfer völkerrechtlicher Verbrechen." Zeitschrift für die gesamte Strafrechtswissenschaft **115**: 352-384. At page 367.

[697] See PTC I, **Situation in the Democratic Republic of the Congo**, Decision on the applications for participation in the proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6 of 17 January 2006, Case No. ICC-01/04, para. 63.

filed and the fact that the personal interests of the victims were affected by the conduct of the proceedings during the stage in which the victims wish to participate.[698]

Another interpretation of "personal interests" is that all victims who clearly demonstrate that they have an interest in telling their stories should be accepted as having a "personal interest". However, this interpretation could also lead to all or at least many victims being allowed to participate as long as they have shown an interest in telling their story. This might also make participation practically impossible due to the potential numbers of victims. For practical reasons (resources), it can be assumed that this is not what was wanted. But most notably it can be said that the scope of victims participation follows a different track.[699]

Furthermore, it has been suggested that victims have a "personal interest" in participation where the prosecution has not fully disclosed victims' evidence.[700] In response, it has been said, that it is doubtful if the Trial Chamber could afford to take this view. The prosecution would always select strategically amongst the available evidence and the Trial Chamber might not be in a position to determine whether or not the omission of evidence was material. Even if the Trial Chamber accepted this approach the Prosecution might decide not to pursue those aspects of the case that relate to a particular victim's evidence, so that the issue of full disclosure was not appropriate. In these circumstances (unless Art. 65(4) Rome Statute applied), it seemed there was little that a victim could do.[701]

Another way of interpreting "personal interests" could be to demand that a victim show that they had suffered a severe impairment. Yet such a criterion seems to be too imprecise

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[698] See PTC I, **Situation in the Democratic Republic of the Congo**, Decision on the applications for participation in the proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6 of 17 January 2006, Case No. ICC-01/04, para. 64.

[699] See above page 32.

[700] See thereto in **Haslam**, **E.** (2004). Victim Participation at the International Criminal Court: A Triumph of Hope over Experience? The Permanent International Criminal Court. Legal and Policy Issues. D. McGoldrick, P. Rowe and E. Donnelly. Oxford and Portland Oregon, Hart Publishing**:** 315-334. At page 326.

[701] Ibid. at page 326.

to provide for legal certainty. As it seems impossible to measure how much a person suffered, this solution would inevitably lead to arbitrary results.

The next way of interpreting „personal interests" would be to recognise a personal interest only insofar as it relates to the functions of the ICC (for example, the determination of criminal responsibility, the granting of individual or collective reparations, the contribution to reconciliation). The Court is unlikely to be interested in hearing a story for its own sake. Consequently, victims are likely to be requested to relate to one of the ICC's functions.[702] Up to now, the PTC has also interpreted it as requirement of a "personal interest" to have a "judicially recognisable personal interest". This must relate to the specific matters at issue within the framework of the Court's proceedings.[703] However, the Court in this decision did not further elaborate on which "specific matters" it had in mind. The Prosecution then stated that such a personal interest must necessarily go beyond an applicant's status as a victim and must relate to the specific matters being discussed within the framework of the Court's proceedings and not to the fact that crimes within the Applicant's situation are being investigated. [704]

A new criterion was introduced by Trial Chamber I. In its decision of 18 January 2008 the Chamber stated that the critical question was whether there was either a "real evidential link between the victim and the evidence which the Court will be considering during trial, leading to the conclusion that the victim's personal interest are affected" or that the victim was "affected by an issue arising during trial because his or her personal interests was in a real sense engaged in it".[705]

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[702] Ibid.

[703] See Prosecutor, Situation in the Democratic Republic of the Congo **Prosecutor vs. Thomas Lubanga Dyilo.** Prosecution's Observations concerning the Status of Applicants VPRS1 to 6 and their Participation in the Case of The Prosecutor vs Thomas LUBANGA DYILO of 7 April 2006, Case No. ICC-01/04-01/06-73-AnxA, para. 9.

[704] Prosecutor, **Situation in the Democratic Republic of the Congo**, Prosecution's Observations on thé Applications of Applicants a/0001/06 to a/0003/06 of 6 June 2006, Case No. ICC-01/04-151, para. 9, and Prosecutor, **Situation in the Democratic Republic of the Congo,** Prosecution's Reply on the Applications for Participation 01/04-1/dp to 01/04-6/dp of 15 August 2006, Case No. ICC-01/04-84-Conf, para. 28.

[705] Situation in the Democratic Republic of the Congo in **Prosecutor v. Thomas Lubanga Dyilo,** Decision on victim's participation of 18 January 2008, Case No ICC-01/04-01/06. At para.95.

This was predictable as it was already mentioned that the personal interests of the victims must be directly affected by the proceedings in which he or she is applying to participate, that is, that the personal interests of the victim must be causally connected to the specific crimes being prosecuted.[706] It already seemed that the causal link would also be interpreted as meaning "directly linked" in a similar way to the causal link under Rule 85.[707] The ICC had also demanded this causality[708], that is, from the point on, that a specific accused is definite.

Although narrower than other interpretations, it seems that the latter suggestion of how to interpret "personal interest" will be the path which the Court will follow in future, maybe finding definitions that will restrict the criterion of "personal interest" even further.

It is true, that the first discussed criterion of a "judicially recognised interest" is still too imprecise and has to be developed in the way that has already been taken by Trial Chamber I. If this solution will be adopted in a consistent manner, the term will end up being even narrower but more precise with regard to the outstanding questions.

When considering on the one hand the above mentioned comparison to the abstract definition of „victim" and on the other hand the factual possibilities, it may well be that this solution will be the most feasible of those put forward.

Victims should be informed of this fact.[709]

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[706] See Prosecutor, Situation in the Democratic Republic of the Congo **Prosecutor vs. Thomas Lubanga Dyilo.** Prosecution's Observations concerning the Status of Applicants VPRS1 to 6 and their Participation in the Case of The Prosecutor vs Thomas LUBANGA DYILO of 7 April 2006, Case No. ICC-01/04-01/06-73-AnxA, para. 10.

[707] See above pages 90 et seq.

[708] See PTC I, Situation in the Democratic Republic of the Congo in **Prosecutor vs. Thomas Lubanga Dyilo,** Decision on applications for participation in proceedings a/0004/06 to a/0009/06, a/0016/06, a/0063/06, a/0071/06 to a/0060/06 and a/0105/06 in the case *The Prosecutor vs. Thomas Lubanga* Dyilo of 20 October 2006, Case No. ICC-01/04-01/06-601-tEN, page 9; see also PTC I, Situation in the Democratic Republic of the Congo in **Prosecutor v. Thomas Lubanga Dyilo,** Decision on the Applications for participation in the proceedings submitted by VPRS 1 to VPRS 6 in the Case the Prosecutor v. Thomas Lubanga Dyilo of 29 June 2006, Case No. ICC-01/04-01/06-172-tEN, at page 8.

[709] The victim booklet for instance does not further enlarge on this detail.

It can be assumed that for the reasons of expediency and possibly a fair trial the Trial Chamber will not grant a victim's application to participate where his or her personal interests have been raised by another victim's intervention or by witness testimony.[710] Still, in cases of crimes with multiple victims the Court could tend to conflate individual victims' interests with the interests of collective victim hood. [711]

In summary, it is clear that, at least in the pre-trial and trial proceedings, the ICC will only acknowledge a "judicially recognised interest" that will develop in an interest that is directly related to the proceedings. Due to the resources of the Court, this may be the only feasible solution. However, it seems that this relatively narrow interpretation should be explained to victims. The booklet "Victims before the ICC" does not specify what "personal interests" may be, so that victims will probably only be able to find out what the prerequisites for application are by consulting a lawyer. Even then it might not be altogether clear because the Court has thus far not explained what exactly a "judicially recognisable interest" is.

II. Application

According to Art. 68, Rule 89, in order to be admitted to participate victims need to apply to do so, regardless of which stage of the proceedings they intend to participate in. If victims have already participated in the investigations and/or Pre-Trial phase they do not need to apply anew, his or her application will automatically be considered in the next stage.[712]

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[710] See above Chapter on the notion of victim, part "collevtively":

[711] See similarly **Haslam**, **E.** (2004). Victim Participation at the International Criminal Court: A Triumph of Hope over Experience? The Permanent International Criminal Court Legal and Policy Issues. D. McGoldrick, P. Rowe and E. Donnelly. Oxford and Portland Oregon, Hart Publishing**:** 315-334. At page 326.

[712] See above pages 134 et seq.

1. The application

The formal precondition for participation according to Rule 89(1) is a written application to the Registrar. In accordance with Rule 102, communications may be made in other forms when a person is unable, due to a disability or illiteracy, to make a written request.

Since fall 2006 there are two standard forms for participation on the website of the ICC[713], one for natural persons, the other for legal persons.

In the first case where victims applied for participation before the ICC, the standard forms had not yet been available and the applicants used forms of the International Federation of Human Rights ("FIDH") instead. The Chamber stated that the use of standard forms was not compulsory and that the applicants were entitled to use other forms as long as the information required by Regulation 86(2) was contained in them.[714]

There are separate application forms for reparation.[715] It had also been suggested that a single form should be provided for both participation and reparation but this scheme was not adopted. This seems to be consistent because of the fact that reparation and participation can be applied for independently of each other.

As to the content of an application Regulation 86(2) provides that applications shall contain the identity and address of the victim, or the address to which the victim requests all communications to be sent. If the application is presented by someone other than the victim in accordance with Rule 89(3), it is the identity and address of that person, or the address to which that person requests all communications to be sent which will be used. There are a number of things which should be included in the

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[713] See "home"→"victims and witnesses"→participation of victims in the proceedings; http://www.icc-cpi.int/library/victims/Form-Participation-1_en.pdf; http://www.icc-cpi.int/library/victims/Form-Participation-2_en.pdf: see also page 23 of the booklet on where else to obtain an application form.

[714] See also PTC I, Situation in the Democratic Republik of the Congo, Decision on the applications for participation in the proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6 of 17 January 2006, Case No. ICC-01/04, para. 102.

[715] See „home"→"victims and witnesses"→"reparation for victims"; http://www.icc-cpi.int/library/victims/Form-Reparation-1_en.pdf; http://www.icc-cpi.int/library/victims/Form-Reparation-2_en.pdf.

application, including a description of the harm suffered resulting from the commission of any crime committed within the jurisdiction of the Court, or, in case the victim is an organization or institution, a description of any direct harm as described in Rule 85(b); a description of the incident, including its location and date and, to the extent possible, the identity of the person or persons the victim believes to be responsible for the harm as described in Rule 85; any relevant supporting documentation, including names and addresses of witnesses; information as to why the personal interests of the victim are affected; information on the stage of the proceedings in which the victim wishes to participate, and, if applicable, on the relief sought; information on the extent of legal representation, if any, which is envisaged by the victim, including the names and addresses of potential legal representatives, and information on the victim's or victims' financial means to pay for a legal representative.

These parameters are all contained in the standard forms provided for by the ICC. Additionally, there is a standard request for non-disclosure of information in part H.

At the time of writing, the ICC's website, so far only provides for an English and a French version of the participation forms and booklet. Unofficial sources from within the ICC staff have said that the forms will be translated into other languages "as and when the Court has the capacity to receive completed applications in those languages". At present, the Victims Participation and Reparation Section ("VPRS") was focusing on making explanatory materials available in other languages, including the explanatory booklet which was currently being translated into Arabic.

In the information booklet, applicants are requested to use one of these two languages if at all possible. If applicants are unable to submit a form in English or French, and would like to submit the application form in another language, they are recommended to first contact the Court or its Field Offices, since the Court does not have translators who can work in all languages and has limited funds for this purpose.[716]

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[716] See victim booklet at page 26.

The author strongly submits that the available documents ought to be translated into those languages which might be spoken by the victims in the countries where the ICC is investigating and allow for the completion of forms in those languages. Of course victims can be recommended to ask for help and for completing the forms in English or French, but if they will not do so for different reasons, this should not hinder their participation.

Apart from this it is clear that a victim already has to give a lot of information in the application forms, of which some is difficult to submit without legal advice. For example, in order to be able to give information on the criteria of Rule 85, if personal interests exist etc., one needs detailed knowledge on how these terms are being interpreted which, as seen above, even with legal knowledge is not easy to determine.[717] It can be presupposed that without legal advice an application will often fail.

During the Preparatory Commissions there was discussion on how much information the application form should contain. On the one hand it was said that information was important for the assessment of the application, while on the other hand a very detailed form would discourage victims from using it and would also increase the likelihood of mistakes and other inaccuracies.[718] It seems that a middle course has been found, but legal advice will still be necessary if victims are not to be discouraged.

Though the Registrar may request further information from victims according to Regulation 86(4) and (5), it seems he or she will not necessarily do so if there are a number of applications.

However, victims can seek help at the ICC or Field Offices, as is pointed out in the participation forms. It remains to be seen how comprehensive this help will be. As for legal assistance[719] it seems that without sufficient financial means it will not be easy for

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[717] See above pages 65 et seq. where it can be seen that the interpretation is not clear at all.

[718] See **Victims Right Working Group**. Victim Participation at the International Criminal Court Summary of Issues and Recommendations, Victims Right Working Group (2003). At page 8.

[719] At page 16 of the victim booklet it is strongly suggested that victims shall ask for legally qualified help; see also page 40 of the booklet for contact information.

victims "to get started" because, to obtain financial aid a victim has to fill in even more forms.[720] In such cases, the Field Offices should offer victims assistance.

Once the Registrar has received an application he or she shall transmit the application to the relevant Chamber. The Registrar shall further provide a copy to the Prosecutor and the defence, who can respond, within a time-frame stipulated by the chamber.[721] Upon receipt the Court transmits the application to the Prosecutor and the Defence for comments and then rules on the request. Thus, when the security situation of an applicant so requires, the PTC may instruct the Registrar to pass on a redacted copy of his or her application to the Prosecutor and the Defence, having expunged any information that could lead to his or her identification. The scope of the redactions may, however, not exceed what is strictly necessary in light of the applicant's security situation and must allow for a meaningful exercise by the Prosecution and the Defence of their right to reply to the application for participation.[722] If the suspects are not yet being represented by a defence counsel, a counsel for the Defence will be appointed to carry out the right to reply to the applications for participation.[723]

If the application is successful, subsequent communications by the Court should usually be addressed to the victims.

The Court has thus far faced substantial problems in processing the applications which it has received: the filing of hundreds of applications to participate in ICC proceedings has overly burdened the participation framework. Substantive participation thus far remains limited to a handful of victims who are participating in the *Lubanga* case. Many victims seeking to participate in the ICC proceedings had to wait for longer than a year for a

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[720] See below Chapter on legal representation.

[721] See Rule 89.

[722] PTC I, Situation in the Democratic Republic of the Congo in **Prosecutor vs. Thomas Lubanga Dyilo**, Decision on protective measures requested by applicants 01/04- 1/dp to 01/04-6/dp of 21 July 2005. Case No. ICC-01/04-73 at page 3.

[723] PTC II, Situation in Uganda in **Prosecutor vs. Joseph Kony, Vincent Otti, Okot Odhiambo, Dominic Ongwen**, Decision on legal representation, appointment of counsel fort he defence, criteria for redactions of applications for participation, and submission of observations on applications for participation a/0014/17 to a/0020/07 and a/0076/07 to a/0125/07 of 17 September 2008 at pp.4 et seq.

decision to obtain a theoretical participation privilege which in many cases will never be converted in an actual right to express views and concerns in court proceedings.[724]

Victims are asked to contact the VPRS in The Hague or at a Field Office if they wish to make enquiries about their application. If victims wish to withdraw an application they are asked to inform the Court by immediately contacting the VPRS in The Hague or at a Field Office, in both cases giving their registration number. [725]

2. When to apply, time limits

Whether victims can participate in the investigation phase according to Art. 68 was contested but was later conceded[726] and is admissible in later stages of the proceedings.

In general, the application may relate to particular proceedings or be of a more general nature.[727] Part C on page 9 of the application form lists all stages of the proceedings. This may give a victim the impression that he or she can only chose to participate in one of the stages given. However, the booklet specifies that the applicant must decide whether he or she wishes to participate at one or more stages or to select all stages.[728]

Victims should generally contact the Court after confirmation of the charges by the Pre-Trial Chamber, so that it can make a definite ruling on their further participation in the trial.

As far as possible, victims applying for participation should also make their application to the Registrar before the start of the stage of the proceedings in which they want to

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[724] See **Chung, Christine H.** "Victims' participation before the International Criminal Court: Are Concessions of the Court clouding the Promise ?". in: Northwestern Journal of International Human Rights **6** (3) (2008), pp. 459-545.pp. 462 et seq.

[725] See page 26 victim booklet and Regulation 101 of the Regulations of the Registry.

[726] See above at pages 112 et seq.

[727] **Bitti**, **G.** and **H. Friman** (2001). Participation of Victims in the Proceedings. The International Criminal Court, Elements of Crimes and Rules of Procedure and Evidence. R. S. Lee. Ardsley, New York, Transnational Publishers**:** 456-474. At page 460.

[728] See victim booklet page 35 on Part C of the form.

participate.[729] In the booklet on participation victims are made aware of this fact.[730] If victims do not adhere to this guideline it may be that their application will only be considered at a later point in the proceedings. Some aspects of participation will be excluded if victims do not apply in time. For instance, victims are only allowed to participate in an interlocutory hearing or in respect of any issue that is live before the Court if the application is received sufficiently in advance of the hearing of the particular issue.

The Statute and Rules do not provide for strict deadlines before which a person must have applied to participate in the proceedings. This would also contradict the Rule that victims may always reapply at a later stage of the proceedings.[731]

However, for certain parts of the proceedings the Rules do provide that the Court can set "time limits regarding the conduct of any proceedings" and in doing that "shall have regard to the need to facilitate fair and expeditious proceedings, bearing in mind in particular the rights of the defence and victims".[732] This, along with Regulation 86, leads to the conclusion that the PTC can indeed set time limits for participation in parts of the proceedings, however, it is to be presumed that there will be no fixed time applicable to all cases.[733] Even if this were desirable for the purpose of legal certainty, the PTC must have the liberty to decide if it wants to set a time limit. As the Defence has rightly argued, it is not desirable that many victims file their applications at the "last moment" because the Defence then does not have sufficient time to prepare. On the other hand, as clearly

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[729] See Regulation 86(3).

[730] See page 27 of the booklet under the question "Are there time limits for participating in the various stages of the proceedings?".

[731] See Rule 91.

[732] Rule 101(1), Rule 101(2) reads: "Taking into account the rights of the accused, in particular under Art. 67(1)(c), all those participating in the proceedings to whom any order is directed shall endeavour to act as expeditiously as possible, within the time limit ordered by the Court."

[733] Such fixed time limits have in one case been demanded by the Defence, stating that strict time limit as set in Rules 121(3), (4) and (5) for the Prosecution and Defence was wanted for victims' applications, too, see: Defence, Situation in the Democratic Republic of the Congo in **Prosecutor vs. Thomas Lubanga Dyilo,** Defence submissions regarding the applications for participation in the proceedings of applicants a/0004/06 to a/0052/06 of 4 September 2006, pp. 12 et seq.

stated by Regulation 86[734] in special cases the Court may admit applications at the "last minute". However, over time it will be possible to gauge the standard of how long before the beginning of the proceedings one normally has to file an application.

In one case the Defence asked for time limits to be set for certain parts of the proceedings. It was submitted that the fairness of the proceedings required that some limitations be placed on the timing of applications to participate as victims before the confirmation hearing.[735] It was argued further that it was not appropriate to admit a large volume of applications in the months immediately preceding the confirmation hearing as this would impose an impossible burden on the Defence which might prejudice its ability to prepare sufficiently for the confirmation hearing, as required by Art. 67(1)(b).[736] In the view of the Defence, under Art. 68(3) permitting victims' views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court, it was necessarily implied that the Chamber must consider whether it was appropriate to admit a large volume of applications in the months immediately preceding the confirmation hearing, given the sheer number of outstanding issues which must also be addressed by the parties in this short time period.[737]

In its decision of 6th November 2006[738] the PTC referred the Defence to a decision of 20th October where the PTC held that no further applicants for participation would be

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[734] Saying „to the extent possible", leaving the possibility for exceptions open.

[735] See Defence, Situation in the Democratic Republic of the Congo in **Prosecutor vs. Thomas Lubanga Dyilo,** Request for Leave to Appeal the Décision autorisant le dépôt d´observations sur les demandes de participation à la procédure a/0004/06 à a/0009/06, a/016/06 à a/0063/06 et a/0071/06 of 28 September 2006, Case No. ICC-01/04- 06-487, paras. 7, 8; 28.09.

[736] See Defence, Situation in the Democratic Republic of the Congo in **Prosecutor vs. Thomas Lubanga Dyilo,** Request for Leave to Appeal the Décision autorisant le dépôt d´observations sur les demandes de participation à la procédure a/0004/06 à a/0009/06, a/016/06 à a/0063/06 et a/0071/06 of 28 September 2006, Case No. ICC-01/04- 06-487, paras. 48 et seq.

[737] See Defence, Situation in the Democratic Republic of the Congo in **Prosecutor vs. Thomas Lubanga Dyilo,** Request for Leave to Appeal the Décision autorisant le dépôt d´observations sur les demandes de participation à la procédure a/0004/06 à a/0009/06, a/016/06 à a/0063/06 et a/0071/06 of 28 September 2006, Case No. ICC-01/04- 06-487, para. 50; 28.09.

[738] See PTC I, Situation in the Democratic Republic of the Congo in **Prosecutor vs. Thomas Lubanga Dyilo,** Decision on the Defence request for leave to appeal regarding the transmission of applications for victim participation of 6 November 2006, Case No.ICC-01/04-01/06-672-tEN, page 7.

entertained in the case of *The Prosecutor v. Thomas Lubanga Dyilo* prior to the confirmation of charges hearing which was to be held on 9th November 2006.[739] In the present case the Chamber therefore set a limit of 20 days before the hearing as to when applications had to be received. At first glance it seems that 20 days is a rather long period but on the other hand, as already stated, if many applications are received, the Court authorities involved could be as overwhelmed as the Defence.[740] The Chamber will have to consider on a case-by-case basis the volume and additional workload required to process, analyse and comment on the applications.

Adopting a general practice of rejecting *in limine* any voluminous application for victim participation in the months immediately preceding the confirmation hearing, as has been advocated by the Defence, is a step that, due to its importance and consequences for the rights of third parties, has been said to at least require a full discussion before the Chamber regarding its necessity and proportionality as well as its basis in the Statute and the Rules.[741] The author submits that such a decision would unduly restrict the rights of the victims, making a regular participation almost impossible.

If limitations became standard practice over time, victims should be informed of this fact and maybe even of the period that normally applies even if exceptions are always possible.

An application does not suspend the proceedings pending its determination.

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[739] See PTC I, Situation in the Democratic Republic of the Congo in **Prosecutor vs. Thomas Lubanga Dyilo,** Decision on applications for participation in proceedings a/0004/06 to a/0009/06, a/0016/06, a/0063/06, a/0071/06 to a/0060/06 and a/0105/06 in the case *The Prosecutor vs. Thomas Lubanga* Dyilo of 20 October 2006, Case No. ICC-01/04-01/06-601-tEN.

[740] In violation of Art. 67 (1) (c).

[741] See Prosecutor, Situation in the Democratic Republic of the Congo in **Prosecutor vs. Thomas Lubanga Dyilo,** Prosecution's Response to Thomas Lubanga Dyilo's 28 September 2006 Request for Leave to Appeal the "Décision autorisant le dépôt d'observations sur les demandes de participation à la procédure a/0004/06 à a/0009/06, a/0016/06 à a/0063/06 et a/0071/06" of 3 October 2006, Case No. ICC-01/04-01/06-498, para. 17.

If the victim applies to participate at a stage of the proceedings not deemed suitable for such participation by the Court, the Court may not reject the application but can only postpone the participation of the victim.[742]

It is important to note again that whether victims can and will act in compliance with the above regulations will depend to a certain degree on the legal advice they have received and on the notification regarding the stage of the proceedings. If victims are being well informed they will mostly apply to the proceedings as soon as possible for being able to take part actively from the beginning and being notified in a comprehensive way.

3. Onus of proof

Whether victims must produce evidence or at least substantiate their application in some way, is not clearly regulated in the ICC Statute and Rules.

One has to differentiate between evidence concerning the identity of the victim and evidence concerning the case itself.

With regard to the former, it is principally up to the victim to verify his or her identity. In the application form[743] victims are asked to indicate the number of reference proving his or her identity and attach a photocopy if possible. However, it is also said that an application will still be considered if the victim does not have documentation. It is not completely clear what is meant by this, but it can be assumed that the victim will then have to manifest his or her identity in some other way and the victim's participation will most probably not be considered if there is no indication as to the person's identity at all.

Pre Trial Chamber II has stated on this topic that, in principle, the identity of an applicant should be confirmed by a document (i) issued by a recognised public authority, (ii) stating the name and the date of birth of the holder, and (iii) showing a photograph of the

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[742] See **Donat-Cattin**, **D.** (1999). Art. 68 "Protection of victims and witnesses and their participation in the proceedings". Commentary on the Rome Statute of the International Criminal Court. Observers´Notes Article by Article. O. Triffterer. Baden-Baden, Nomos Verlagsgesellschaft. At page 881.

[743] See page 5 of the application form.

holder.[744] In this decision the Single Judge has for instance accepted a "voting card" as a sufficient proof for the identity.

Trial Chamber I considered the following proof of identity valid: official identification documents, diverse non-official identification documents and even other documents. For those instances where it was not possible for an applicant to acquire or produce documents of this kind, the Chamber will consider a statement signed by two credibly witnesses attesting to the identity of the applicant and including, where relevant, the relationship between the victim and the person acting on his or her behalf, providing there is consistency between the statement and the application.[745]

With regard to evidence relating to the case itself, that is, the question of whether the person has suffered harm or has a personal interest, etc., again, there is no guidance on the question in the Statute or Rules.

The criminal procedure of the Court concerning evidence is principally based on the adversarial system where the parties, that is the prosecutor and defence, must present before the Court all evidence themselves[746].[747] In accordance with the principle of presumption of innocence and as set forth in Art. 66, the burden of proof is on the Prosecutor to prove beyond reasonable doubt the accused's guilt.[748] According to Art. 67 (1)(e) the accused is then entitled to raise defences and to present other evidence admissible under the Statute. In this context it should be noted that victims cannot present

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[744] Pre Trial Chamber II, Situation in Uganda in **Prosecutor vs. Joseph Kony, Vincent Otti, Okot Odhiambo, Dominic Ongwen,** Decision on victims' applications for participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06 of 10 August 2007, Case No.ICC-02/04-01/05, paras. 16 et seq.

[745] Trial Chamber I, Situation in the Democratic Republic of the Congo in **Prosecutor v. Thomas Lubanga Dyilo,** Decision on victim's participation of 18 January 2008, Case No ICC-01/04-01/06, paras. 87 et seq.

[746] In contrast to the inquisitorial system, where the burden of proof is upon the Court.

[747] See **Jorda**, **C.** and **J. de Hemptienne** (2002). The Status and Role of the Victim. The Rome Statute of the International Criminal Court, A Commentary. A. Cassese, P. Gaeta and J. R. W. D. Jones. Oxford, Oxford University Press. **2:** 1387-1419. At pages 1388, 1391.

[748] See also Art. 67 which contains a right for the accused not to have imposed on him or her any reversal of the burden of proof or any onus of rebuttal.

evidence in the proceedings [749] so that at this point the onus of proof can hardly be placed on them. The issue is thus not about the production of evidence in the proceedings but rather at the point of the victim's application to participate.

It may be that at that point the Prosecutor would already have presented evidence that indicates the guilt of the accused and by logical extension at least partly showing harm to victims. However, one cannot assume that the Prosecutor will necessarily prove all facts that can be important for victims. Victims may receive further help in substantiating their application on behalf of the Registrar and the Victims Participation and Reparation Section.[750]

Ultimately it will to a large extent be up to the Court to decide what standard of proof must be reached by the victims themselves.

When a victim now applies to participate, the Chamber must undertake a preliminary evaluation of the evidence, although the evidence will only be properly presented and evaluated at trial.

If the victim does not provide evidence when applying to participate, the Chamber must rely entirely on the statement of the Prosecutor[751] who, as mentioned above, might not have investigated all circumstances important to a victim. Of course, the Chamber may also have gathered evidence during the investigations, but only in a very cursory way and such evidence would not help to establish detailed and particular facts, such as for instance, the harm suffered by an individual person.

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[749] See below.

[750] See Rule 16 that does not expressly relate to this topic but more generally establishes that the Registrar inter alia shall be responsible for assisting victims in obtaining legal advice and organizing their legal representation, and providing their legal representatives with adequate support, assistance and information, including such facilities as may be necessary for the direct performance of their duty, for the purpose of protecting their rights during all stages of the proceedings in accordance with rules 89 to 91.

[751] See Rule 89 (2).

It has been suggested that a victim who is unable to produce a shred of evidence of the commission of the crime or that this had a causal relationship to any injuries he or she incurred should not be permitted to intervene in the case.[752]

The ICC has already found that applicants who do not provided sufficient evidence to give the Chamber reasonable grounds for believing that the harm they had suffered was directly linked to the crimes described in an arrest warrant were to be refused.[753]

At this point the Chamber's policy may be criticized for not being clear cut enough. On the one hand the Chamber wishes to have investigating powers which may lead the OTP to refrain from investigating a claim in favour of victims. On the other hand it seems clear that the investigative powers of the Chamber are quite limited which might ultimately lead to the victims having to present evidence when applying. Of course, whether the OTP would have presented such evidence if the Chamber had not claimed investigative powers is also questionable.

From the application form and the booklet for victims, it is also clear that victims are expected to provide documents, at least concerning the harm suffered[754], while at the same time the participation form assures victims that if they do not have the documentation requested their application will still be considered.[755]

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[752] **Jorda**, **C.** and **J. de Hemptienne** (2002). The Status and Role of the Victim. The Rome Statute of the International Criminal Court, A Commentary. A. Cassese, P. Gaeta and J. R. W. D. Jones. Oxford, Oxford University Press. **2:** 1387-1419. At page 1409.

[753] See PTC I, Situation in the Democratic Republic of the Congo in **Prosecutor v. Thomas Lubanga Dyilo,** Decision on the Applications for participation in the proceedings submitted by VPRS 1 to VPRS 6 in the Case the Prosecutor v. Thomas Lubanga Dyilo of 29 June 2006, Case No. ICC-01/04-01/06-172-tEN, page 8.

[754] In the application form on page 2 victims are requested to provide photocopies of documents to the extent possible, on page 10 victims are asked to give names and addresses of witnesses, in the booklet page 35 it is said that it is "in the interests of the applicant to provide as full a picture as possible, because the ICC judges will decide whether they meet the conditions to be accepted as a victim before the ICC based on the information in the form". On page 37 victims are asked to send photocopies of any medical documents if available.

[755] See application form on page 2.

Of course, at the application stage which is a preliminary and summary procedure, the standard of proof is not as high as in the trial proceedings. The standard of proof in general in international legal proceedings has been said to be "less formal" than in domestic proceedings, allowing for circumstantial evidence, indicia and presumptions in special cases.[756] It is not the submissions of the author that this will be the case for all ICC proceedings, but it seems fair to assume that at least in preliminary proceeding such as the decision on the participation applications, a lower standard of proof will apply.

The standard of proof will thus also depend on the point of proceedings at which the application takes place. The Chamber has stated in the context of the investigation stage that it had to define an examination criterion that would enable it to establish the burden of proof for future victims and their legal representatives.[757] The Chamber considered that, with regard to the present stage of the proceedings, i.e. that of investigation of the situation, it was reasonable to set a relatively low threshold[758], the so called "grounds to believe criterion". The Chamber then noted that as soon as a warrant of arrest was issued, the examination criterion was more restrictive.[759] Indeed, the Chamber has stated that for proceedings after a warrant of arrest that the causation requirement under Rule 85 is satisfied where the victim provides sufficient evidence to show that there are "reasonable grounds to believe" that he or she had suffered harm directly linked to the crimes described in the warrant of arrest.[760]

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[756] See **Velásquez Rodríguez vs Honduras,** Judgement of July 29, 1988, Series C, No. 4, Series C No. 4.

[757] See PTC I, Situation in the Democratic Republik of the Congo, Decision on the applications for participation in the proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6 of 17 January 2006, Case No. ICC-01/04, para. 95.

[758] See also PTC I, Situation in the Democratic Republik of the Congo, Decision on the applications for participation in the proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6 of 17 January 2006, Case No. ICC-01/04, para. 97.

[759] See also PTC I, Situation in the Democratic Republik of the Congo, Decision on the applications for participation in the proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6 of 17 January 2006, Case No. ICC-01/04, para. 98.

[760] See PTC I, Situation in the Democratic Republic of the Congo in **Prosecutor vs. Thomas Lubanga Dyilo,** Decision on applications for participation in proceedings a/0004/06 to a/0009/06, a/0016/06, a/0063/06, a/0071/06 to a/0060/06 and a/0105/06 in the case *The Prosecutor vs. Thomas Lubanga* Dyilo of 20 October 2006, Case No. ICC-01/04-01/06-601-tEN, at page 9.

Finally, it is clear that it will indeed be necessary for victims to produce substantiated facts or even evidence when applying to participate. At the very least it will improve their chances of actually being considered as a participant to the proceedings even if in some cases they will receive help from the OTP or the Chamber. The standard of proof meanwhile will, depending on the state of proceedings, probably not be too high.

It is submitted that victims should not be expected to provide evidence that they are not really in a position to obtain for practical and perhaps psychological reasons. Especially when groups of victims are represented by a single legal representative[761] it will be very burdensome and mostly impossible to provide evidence in each individual case. Often this work may even prove to be superfluous when the OTP has already obtained proof of the same fact in its investigations.

III. Legal representation

Representation by a lawyer is in principle not mandatory for victims before the ICC.[762] In contrast to witnesses, victims do have a right to be represented by a lawyer, but they are not obliged to exercised it, at least not by law.

1. The choice of the legal representative

According to Rule 90(1) a victim shall be free to choose a legal representative from a list created by the Registrar or other counsel who meets the required criteria and is willing to be included in the list[763].[764] The relevant criteria are set out in Rule 22 where it is established among others that the counsel shall have established competence in international or criminal law and procedure, as well as the necessary relevant experience, that the counsel shall have an excellent knowledge of and be fluent in at least one of the

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[761] Which might in the majority of the cases be true.

[762] See Art. 68(3): "Such views and concerns may be presented by the legal representatives of the victims where the Court considers it appropriate, in accordance with the Rules of Procedure and Evidence"; Rule 90.

[763] The list is to be found on the website of the ICC: "home"→"victims and witnesses"→"legal representatives of victims"; http://www.icc-cpi.int/library/defence/Defense_Counsel_List_English.pdf.

[764] See Rule 21(2).

working languages of the Court and in Regulation 67 saying that the necessary relevant experience for counsel as described in Rule 22 shall be at least ten years (subregulation 1), and that the Counsel should not have been convicted of a serious criminal or disciplinary offence considered to be incompatible with the nature of the office of counsel before the Court (subregulation 2).[765]

With regard to the qualification as set in Rule 22, it has been stated that while victims do need professionally competent lawyers and experts, the criteria for the profile of the counsel for victims the criteria are still too strict, as victims are often in contact with organisations, activists or independent lawyers working in their countries and speaking their language.[766] Furthermore, in places such as, for instance in the Republic of the Congo most lawyers operated out of the big cities, about half of the lawyers are registered to practice in Kinshasa and are therefore difficult to reach for many victims.[767]

There is only one list of counsel for defence and counsel for victims containing the names of lawyers, their gender and nationality. From the information given it could be very difficult for victims to find the right lawyer for a number of reasons. First, a victim may not want to have a lawyer that has defended or will defend accused persons; second, it is important to know if the lawyer in question has the requisite legal expertise concerning both victim participation and dealing with trauma, children, gender crimes[768] etc.; third, it is important to know which languages the lawyer is proficient in. As translation is costly, it is important to know if the lawyer speaks not only the official languages of the Court

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[765] See also Regulation on the proof and control of criteria to be met by counsel, Regulation 70 on the inclusion in the list of counsel and Regulation 71 on the Removal and suspension from the list of counsel.

[766] See **Walleyn**, **L.** (2004). Representing victims before the ICC: A major challenge. New York, Global Policy Forum.

[767] Redress, Ensuring the effective participation before the International Criminal CourtComments and Recommendations regarding legal representation for victims, London (2005). At pp 4 et seq.

[768] It has been accentuated that especially for legal counsel representing victims of sexual violence, experience in working with victims of (mass) sexual violence and/or experience in trauma counselling was needed, see **De Brouwer**, **A.-M.** (2007). "Reparation to Victims of Sexual Violence: Possibilities at the International Criminal Court and at the Trust Fund for Victims and Their Families." Leiden Journal of International Law **20**: 207-237. At page 225.

but also the relevant language of the persons he or she is representing; fourth the list does not give any details on how to contact the lawyer in question.

It would seem desirable to create a separate rule that elaborates on the specific knowledge that counsel for victim should have and also a separate list of counsel for victims with the information needed by victims. As long as these do not exist and the relevant information is not on the list, the Registrar or Office of Public Counsel and the Field Offices[769] should help victims to find a lawyer suitable for them.

The Court has in one case noted that in light of the choice expressed by victims, the limitation of the legal aid budget for 2008, and the current status of the proceedings, the Registrar recommended the appointment of members of the Office of Public Counsel for Victims ("OPCV") until such time as either the victims or the Court deduced to appoint an external common legal representative. Consequently in accordance with regulation 80(2) of the Regulations persons coming from the OPCV were in this case appointed as legal representatives of victims.[770]

This decision shows that the choice of a legal representative might further be determined by financial limitations.

2. The common legal representative

The capacity to choose a lawyer may be restricted by the Chamber requesting victims or particular groups of victims to choose a common legal representative or representatives. As stated above, Rule 90(1) of the RPE makes clear that in principle, a victim is still free

[769] The Field Offices will also have to provide help and information in the respective languages and also for persons that do not have internet access or are not able to read.

[770] See Pre Trial Chamber II, Situation in Uganda in **Prosecutor vs. Joseph Kony, Vincent Otti, Okot Odhiambo, Dominic Ongwen**, Decision on legal representation of Victims a/0090/06, a/0098/06, a/0101/06, a/0112/06, a/0118/06, a/0119/06 and a/0122/06 of 15 February 2008, Case No ICC-02/04, at page 4.

to choose a legal representative but ultimately the Registry may have a significant role to play in the choice of counsel in most if not all cases.[771]

This is possible according to Rule 90(2), where there are a number of victims for the purpose of ensuring the effectiveness of the proceedings. Under Regulation 79(1), the decision of the Chamber to request the victims or particular groups of victims to choose a common legal representative or representatives may be made in conjunction with the decision on the application of the victim or victims to participate in the proceedings.

If victims now cannot agree on a common legal representative or representatives within a time limit that the Chamber may decide, the Chamber may request the Registrar to choose one or more common legal representatives.[772] The Chamber and the Registry shall take all reasonable steps to ensure that in the selection of common legal representatives, the distinct interests of the victims, as provided for in particular in Article 68(1)[773], are represented and that any conflict of interest is avoided.[774] They must also ensure that consideration is given to the views of the victims and the need to respect local traditions and to assist specific groups of victims.[775]

By its structure, Rule 90 suggests, that sub-rule 1 which makes the ability to choose freely a legal representative a priority[776] will be the norm. The wording does not explicitly denote the appointment of a common legal representative as an exception to the rule. Thus far it is not apparent if victims will generally participate individually or in groups or

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[771] See **Redress**, Ensuring the effective participation before the International Criminal Court Comments and Recommendations regarding legal representation for victims, London (2005). At page 4.

[772] See Rule 90(3).

[773] In Rule 90(4) a reference is made to Art. 68(1), which particularly refers to victims of sexual or gender violence and children as examples of victims who might have distinct interests that shall be taken into account.

[774] See Rule 90(4).

[775] See Regulation 79(2) and Rule 90(3).

[776] And thereby not only to choose freely the person but also to choose freely the person of the representative but also to chose if wanting to be represented singly or in a group.

if they will participate in choosing their own legal representative or being represented by a person chosen by the Registrar. The practice before the ICC will largely depend on the numbers of victims applying. However, it seems likely that if large numbers of victims apply to participate, a situation which the ICC itself seems to anticipate[777], appointing a common legal representative will probably be the standard approach adopted.

As to the question of common legal representation, Trial Chamber I held in the 18 January 2008 decision that "the personal appearance of a large number of victims could affect the expeditiousness and fairness of the proceedings" and that "victims' common views and concerns may sometimes better be presented by a legal representative". The decision whether or not there should be joint representation would be decided at any particular stage in the proceedings *propriu motu* or upon request ofa party or participant.[778]

As for the question of whether groups of victims will choose their own legal representative, this may to a large extent depend on the time awarded to them for this purpose. Once victims are requested to choose a representative they not only have to choose a lawyer, but first have to form a group of persons. This may be a rather lengthy difficult process when individuals have differing interests and different backgrounds.

The wording of Rule 90(3) leaves it to the Chamber to set a time limit for applying. It seems that the Chamber will as a rule not grant for long time limits due to the need to ensure the expeditious conduct of proceedings. This can only be supposed so far as the wording does not give legal certainty on this question. The difficulties for victims to form groups in a certain time period could mean that it will become standard practise for a common legal representative to be chosen by the Registrar.

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[777] See Rule 89 para.; see also **Stehle**, **S.** (2006). Das Strafverfahren als immaterielle Wiedergutmachung. Frankfurt am Main. At page 317.

[778] See Trial Chamber I, Situation in the Democratic Republic of the Congo in **Prosecutor v. Thomas Lubanga Dyilo,** Decision on victim's participation of 18 January 2008, Case No ICC-01/04-01/06, at para. 118.

How the Registrar will proceed in forming groups of persons - if victims have not formed the required groups themselves - in order to assign them a common representative is not clearly regulated and the Statute and Rules do not provide a clear guidance on the issue. Rule 90(4) provides for certain guidelines as to what shall be respected when grouping persons but it does not definitely lay down any set criteria for putting persons in groups. This Rule may instead guide the Registrar in such questions as the appropriate number of representatives for one group or on the particular qualifications that would be desirable when choosing the representative for a certain group of victims.

Grouping victims together could therefore prove to be a delicate exercise for the Registrar. Indeed, the victims of a specific crime do not necessarily all have the same interests. They may be divided along political, ethnic or religious lines and the Court and Registrar will have to take account of such differences when appointing a common representative. [779]

Trial Chamber I has held that in order to protect the individual interests effectively, it was necessary to apply a flexible approach to the question of appropriateness of common legal representation, and the appointment of any particular common legal representative. As a result, detailed criteria could not be laid down in advance.[780] The Chamber has thus not clarified in which way the individual interests will be considered.

With regard to the criteria for grouping persons together, it seems that one possibility would be to group victims from the point of view of the accused, that is according to the criteria which were applied by the accused in choosing its victims. This approach is based on the fact that the offence was committed against the individual victim because of his or her membership of a certain group or collectivity. These could, for instance, be "groups" similar to those described in Art. 6 or Art. 7 Rome Statute. This seems to be an easy way

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[779] **Walleyn**, **L.** (2004). Representing victims before the ICC: A major challenge. New York, Global Policy Forum.

[780] Trial Chamber I, Situation in the Democratic Republic of the Congo in **Prosecutor v. Thomas Lubanga Dyilo,** Decision on victim's participation of 18 January 2008, Case No ICC-01/04-01/06, paras. 123 et seq.

of grouping people because it might be the case that there could already be enough information on the accused after the investigations in order to group persons together from the accused's point of view. Furthermore, if individuals were victims of the same crime they may have equal legal intentions. However, it is doubtful whether there actually will be reliable information on the accused's aims and intentions at the time of the alleged commission of a crime. There are also other reasons not to take the accused's point of view into account when grouping victims. First of all, victim participation should be victim-centered as much as possible. It is important to group victims in such a way that they can cooperate and interact which each other. Whether victims can and will do so will mainly depend on their own ideas of a group and who should be part of a group, but not of the views of the accused on how to group them, or on supposedly similar legal goals. The victims' view of belonging to a certain group may also not be determined primarily by their legal aims. Furthermore, it seems rather cynical to group persons in the same way they were "grouped" in becoming victims of a crime.

A different approach could be to group persons according to the "personal interest" that they have to set out in their application form. This would involve using a criterion recognised and enunciated by the victims themselves. Yet the personal interest must be a judicially recognised interest[781] that does not refer to victims' personal attributes which might be considered important by the victims themselves, when constituting a group.

Another approach would be to group persons according to personal attributes such as their gender or the ethnic group to which a victim belongs, etc.

However, this, too, seems a course of action of questionable value as it is unclear which personal attribute is deemed the most important by victims themselves. Moreover, victims might not want to be grouped according to personal attributes but might prefer to be in a group sharing a common legal interest. One person is made up of many personal attributes and classifying them according to only one of many attributes might still be difficult and also difficult for the victim to accept.

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[781] See above, pages 142 et seq.

A more obviously deficient method would be to group persons according to the region where they come from. It is common sense that during a war people from the same region can be conflicting parties.

Prima facie, it seems that the most promising method would be to group victims according to how they categorise themselves. However, it must also be recognised that this cannot be decided from victims' applications, as the necessary information is not contained in these forms. There are no indications in the forms regarding the issue of whether victims would prefer to be grouped according to certain personal attributes, to the "personal interest" they have or a common legal strategy.

The most that the Registrar can do is to balance all personal attributes or known interests of victims and attempt to create homogenous groups. The Registrar should, in so doing, try to find out about the victims' own views as has been suggested in Regulation 79(2). If the Registrar perceives conflicts, he or she may decide not to appoint a common legal representative.[782] It seems, however, that not every slight difference between the victims will suffice for the Court to allow separate representation. The question of what is reasonable shall depend on the specific proceedings and on the number of victims who wish to participate.[783] Furthermore, some conflicts will not be apparent at the outset. The Registrar will thus have to be very sensitive to all the issues and may still fail in the one or other case.

It therefore seems to be preferable that victims themselves decide on the composition of their group. If participation with a common legal representative will in fact be standard practice as supposed, the best solution would be to recommend victims to group themselves as soon as possible and preferably to have themselves already grouped together when applying. Victims could be asked to do so in the victim booklet already.

Of course it would be preferable to leave victims the choice, as virtually intended in Rule 90, to choose whether they want to participate alone and with a single legal representative

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[782] Compare Rule 90(4).

[783] See **Calvo-Goller**, **K. N.** (2006). The Trial Proceedings of the International Criminal Court ICTY and ICTR Precedents. Leiden, Boston, Martinus Nijhoff Publishers. At page 247.

of their own choice, but if the practice will be different any way, there is no use in paying lip-service to a *de facto* non-existent option. If when participating, victims already express a clear intention as to the persons with whom they want to form a group, this will supposedly be respected.

After all if victims are grouped in a way they do not like, they can request the relevant Chamber to review the Registrar's choice of a common legal representative under rule 90(3) within 30 days of notification of the Registrar's decision.[784] Regulation 79(3) does not specify whether a review is only possible on the issue of the identity of the common legal representative or also concerning the fact, that a common legal representative has been chosen and that victims cannot participate individually and with their own legal representative or that victims do not want to take part in the respective group which has been composed by assigning a common legal representative.

An effective remedy would have to be capable of dealing with all possibilities. Since the principle of Rule 90(1) is that victims shall be free to choose their legal representative at least in theory, victims should be able to review all those decisions that prevent them from doing so. In the booklet on victim participation, victims are informed that indeed they may review the Registrar's choice of a common legal representative. They are also told that if they would prefer not to be joined with other victims in the same groups, for instance because they believe that their interests need to be represented separately due to a conflict of interest, they can also ask the judges to review this decision.[785] This information from the booklet shows that the review will most probably be designed to deal with all different possibilities mentioned above.

However, Regulation 80 states that a Chamber, following consultation with the Registrar, may appoint a legal representative of victims "where the interests of justice so require" and that the Chamber may appoint counsel from the Office of Public Counsel for victims. Thus, even if victims may review a decision by the Registrar, the Chamber can still decide on the same question. It seems therefore, that then a review is not possible and

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[784] See Regulation 79(3).

[785] See victim booklet page 23.

if the Chamber decides to rule on this question, the principle that victims are free to choose their own legal representative does not apply.

Much will depend on the Chamber's interpretation of the "interests of justice" will be. One of the main reasons for the Chamber to come to such a decision will probably be the expeditious conduct of proceedings, if victims are not able to choose or group within a certain time limit. Of course, it could show over the time that such way of proceeding does for instance not satisfy victims and thus does not promote to reconciliation and is therefore not in the interests of justice neither. But so far, there is no experience as to such an assumption.

3. Financing of the legal representative

If a victim does not have the financial means to pay for a legal representative, he or she may request for his or her legal aid to be paid by the Court.[786] In contrast to the accused, victims do not have a right to financial assistance.[787] If assistance is granted, victims also do not have any guarantee that the support provided will cover the full costs of representation.[788]

In order to obtain financial assistance, victims must fill in a form separate to the standard application form.[789] In the standard application form victims are being informed that they have to do so, concerning the form they are referred to the Field offices and the website of the ICC[790], though the form is not available at present. In any case, Regulation 113(1) of

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[786] See Rule 90(5).

[787] The accused in Art. 55(2)(c) is granted to have legal assistance wihout payment if he or she does have sufficient means to pay for it for the investigations and in Art. 67(1)(d) for the Pre-Trial and Trial Proceedings. Such a provision does not exist for victims.

[788] According to Regulation 83(1) for the accused „Legal assistance paid by the Court shall cover all costs reasonably necessary while regarding victims sub-reg 2 determines that "The scope of legal assistance paid by the Court regarding victims shall be determined by the Registrar in consulation with the Chamber, where appropriate."

[789] Regulation 123 of the ROR provides that victims seeking legal assistance paid by the Court must apply to the Registry.

[790] See the application form.

the Regulations of the Registry ("ROR") states that for the purpose of participation in the proceedings, the Registry shall inform victims that they may apply for legal assistance paid by the Court, and shall supply them with the relevant forms. However, it is submitted that the forms should also be available at the website.

Regulation 113 ROR provides that in determining whether to grant assistance, the Registrar shall take into account, *inter alia*, any special needs of the victims, the complexity of the case, the possibility of asking the Office of Public Counsel for Victims to act, and the availability of *pro bono* advice and assistance. These criteria set out in para. 2 of Regulation 113 appear to suggest that legal representation will only be financed in special cases.[791]

Another limitation is included in Rule 90(5). This provision must be interpreted in such a way that financial aid is only provided for common legal representatives that have been chosen by the court but not for those who have been chosen by a victim him or herself.[792]

The aim of this rule could be that victims shall not choose lawyers that charge higher professional fees then others. However, the rule also leads to situations where victims that cannot pay for a legal representative lose their right to choose freely a legal representative or to choose to have a legal representative on their own. It is doubtful whether this is the correct solution especially because it seems that Rule 90(1) was at least initially intended to give victims a free choice. The danger that victims could choose very expensive lawyers can easily be obviated by setting fixed rates of payment beyond which no further payment will be made.

If victims apply for payment of legal assistance the Registrar decides within one month of the submission of an application or, within one month of expiry of a time limit set in accordance with the Regulations of the Registry, whether legal assistance should be paid

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[791] See equally in **Redress**, Ensuring the effective participation before the International Criminal Court Comments and Recommendations regarding legal representation for victims, London (2005). At page 9.

[792] Rule 90(5) says that "a victim or group of victims who lack the necessary means to pay for a legal representative chosen by the Court may receive assistance from the Registry, including, as appropriate, financial assistance." [emphasis added], see also **David**, **E.** (2005). "La participation des victimes au procès devant la Cour pénale internationale." Recueil des cours de l'Académie de droit international **313**: 325 et seq.para. 4.

by the Court. The decision shall be notified to the applicant together with the reasons for the decision and instructions on how to apply for review. The Registrar may, in appropriate circumstances, make a provisional decision to grant payment of legal assistance.[793] Victims may seek review of this decision by the Presidency within 15 days of notification of the relevant decision. The decision of the Presidency is then final.[794]

Rule 90(5) provides further that victims "may receive assistance from the Registry, including as appropriate, financial assistance."[795]

This could also mean that it will be standard practice to provide non-monetary assistance. There has been no further guidance as to what "appropriate financial assistance" means, giving wide discretion to the Court and uncertainty to the victims. The Court should in the long term give clear guidance on the issue of who can receive financial aid and to what extent.[796]

The situation seems to be unclear with regard to how much financial aid is available in reality. The Court has been called upon repeatedly to provide for more clarity but the topic of financiation of legal representative for victims seems to not have been addressed also in the latest budget for 2007.[797]

In conclusion it can be said that financial aid requires the fulfilment of certain conditions and will not necessarily be afforded to all victims, maybe even only to a few victims. The way in which financial assistance is provided for not only severely restricts the free choice of a legal representative but also creates a clear inequality between the options

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[793] See Regulation 85(1).

[794] See Regulation 85(3).

[795] According to Regulation 84 the Registrar shall determine the applicant's means and whether he or she shall be provided with full or partial payment of legal assistance.

[796] Columbia had in the Preparatory Commissions recommended the introduction of objective criteria, see Columbia, PCNICC/1999/WGRPE/DP.39 of 12. November 1999; http://documents-dds-ny.un.org/doc/UNDOC/GEN/N99/347/55/pdf/N9934755.pdf?OpenElement.

[797] See **CICC**, Comments on the Proposed Programme Budget for 2007 of the International Criminal Court and other matters (2006). Para. 35.

open to an accused person and those presented to a victim has. It may even be fair to assume that the majority of the victims, coming from war-stricken countries, will not have the financial means to cover the cost of legal representation.

Another difficulty is that if the Court via Rule 90(2) can request a group of victims to choose a common legal representative without providing them with financial support, victims might face a situation where they have to pay for legal representation without having the means to do so.

Thus, both the concept and the means provided do not fit in with the idea that providing access to justice is essentially about removing barriers, including economic barriers, which make the exercise of rights illusory.[798]

The lack of options to obtain financial aid for legal representation must be criticized all the more as victims are not being informed of this fact in the victim booklet.[799] Of course, informing them of the limited financial support available could also mean deterring them from participating, however, failing to inform of this fact can only lead to frustration.

In summary, considering the complex provisions of the ICC and the wide legal latitude given to the Court at many points, an effective realisation of victims' rights is only possible with adequate legal representation. The fact that such legal assistance is given financial backing only half-heartedly leads to scepticism as to the true desire to enforce victims rights fully.

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[798] See **Human Rights Watch**. Commentary to the third Preparatory Commission Meeting on the International Criminal Court, at http://www.iccnow.org/documents/prepcom/papersonprepcomissues/HRWComment3rdPrepComNov99.pdf.

[799] See booklet on page 23 only saying that "although the Court's resources for legal aid are limited, the Court may be able to provide some partial or full financial assistance. The legal assistance provided by the Office of Public Counsel for Victims to victims is without charge."

4. Conclusion

As stated above, the complexity of the proceedings means that there is no effective access to justice without skilful and responsible legal representation.[800] Furthermore, victims' rights are automatically lessened when they must participate without legal representation.[801]

Even if victims have the option, *prima facie, to* chose their own legal representative, *de facto*, this is a very limited option because of the way victims can be allocated a common legal representative and especially because of the unsatisfactory financiation support of the scheme.

IV. Rejection of the application for participation

If the Chamber considers that one of the necessary criteria for an application to participate is not fulfilled it may reject the application. The Chamber can reject such an application, either *proprio motu* or on the application of the Prosecutor or Defence.[802]

If an application for participation is rejected by the Chamber for any reason, the applicant is notified.[803]

The Trial Chamber is not required to give reasons for its decisions on participation.[804] It has been stated that application for participation must be rejected delicately so that turning down or restricting participation does not deny victims the official acknowledgment of their suffering which they may seek. Otherwise, there is a danger that

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[800] This is also what is recommended by the ICC in the booklet for victims on page 23 saying: "Criminal proceedings are complex and it is in the best interest of a victim to get appropriate legal advice and representation."; see also (2005). Ensuring the effective participation before the International Criminal Court. Comments and Recommendations regarding legal representation for victims. Redress. London, Redress. At page 4.

[801] See below chapter participation without legal representation.

[802] See Rule 89(2).

[803] See victim booklet page 26.

[804] Such an obligation is not provided for in the provisions.

victims might come to consider effective participation as a remote and unlikely prospect.[805] This is indeed desirable, but it is doubtful whether a formal, written rejection without further reasoning will be delicate enough for these purposes but it seems likely that the Court will not do more than that. It is submitted that the Court should try to make sure that a victim will not be prevented from reapplying to participate simply because of the manner in which the rejection is given. However, if no reasons are given the rejection can indeed be discouraging.

If the victim's application to participate is rejected, the Statute and Rules *prima facie* only provide for one option for victims, i.e. to file a new application later on in the proceedings.[806]

Such a right cannot, of course, compare with a right to review the decision or an appeal. It may be that the victim can no longer participate in the part of the proceedings at hand anymore even if the decision was wrong. Additionally, full legal protection and rights of appeal can only be achieved if a second decision does not go to the same but to a higher authority. Presently, however, victims can only "try again" which can be frustrating and may arouse an impression of arbitrariness, especially if the decision does not contain reasons for its rejection of the application.

However, there is no right to review or an appeal in either the Statute or the Rules. Such a right to review could only be derived from the general idea of access to justice. The idea of access to justice as contained for instance in the Council of Europe's Recommendation No. R (85)11[807], however, refers to decisions not to prosecute at all but not to the personal participation of victims in the proceedings.

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[805] Compare **Haslam**, **E.** (2004). Victim Participation at the International Criminal Court: A Triumph of Hope over Experience? The Permanent International Criminal Court. Legal and Policy Issues. D. McGoldrick, P. Rowe and E. Donnelly. Oxford and Portland Oregon, Hart Publishing**:** 315-334.

[806] See Rule 89(2), this is what is also recommended by the victim booklet on page 26, asking the victim to specify the registration number provided when first applying.

[807] See Council of Europe Recommendation No. R (85)11 on the 'Position of the Victim in the Framework of Criminal Law and Procedure', under recommendation B.7; http://polis.osce.org/library/f/2669/468/CoE-FRA-RPT-2669-EN-Recommendation%20No.%20R(85)%2011.pdf

It should also not be forgotten that the Statute does provide for a solution, i.e. victims to make a new application, which most likely means that the drafters consciously did not want to create a right to review.

While some authors speak of a "right" and not an "interest" of victims to participate in the proceedings[808] the author would submit that one cannot speak of there being a comprehensive right to participate as long as there is no provision for a review mechanism.[809] Of course, such a review mechanism, might hinder the expeditious conduct of the proceedings if victims availed of it in great numbers. However, the facts mentioned before should be at least made clearer and the process more transparent.

V. Modalities and extent of participation

In a positive decision that allows victims to participate in the trial proceedings the Chamber shall specify the proceedings and manner in which participation is considered appropriate. The Chamber may modify this ruling later on at any time[810]

In order to maintain flexibility and the ability to react to developments in the course of the trial, Rule 91(1) clarifies that a ruling under Rule 89 may be modified. The reason for inserting the provision in this rule seems to have been to meet the need to issue a modified ruling so as to allow a more extensive participation when victims, who had previously been granted the right to limited participation, had chosen a legal representative. Even if it is not explicit, the basic requirements for a ruling according to

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[808] See **Donat-Cattin**, **D.** (1999). Art. 68 "Protection of victims and witnesses and their participation in the proceedings". Commentary on the Rome Statute of the International Criminal Court. Observers´Notes Article by Article. O. Triffterer. Baden-Baden, Nomos Verlagsgesellschaft. At page 873 who refers to the wording of Art. 68 (3): "…shall permit their views"….

[809] See also **Jones**, **J. R. W. D.** (2002). Protection of Victims and Witnesses. The Rome Statute of the International Criminal Court, A Commentary. A. Cassese, P. Gaeta and J. R. W. D. Jones. Oxford, Oxford University Press. **2:** 1355-1370, **Jorda**, **C.** and **J. de Hemptienne** (2002). The Status and Role of the Victim. The Rome Statute of the International Criminal Court, A Commentary. A. Cassese, P. Gaeta and J. R. W. D. Jones. Oxford, Oxford University Press. **2:** 1387-1419. at page 1405 who describes the right to participation was only potential as the victim unlike the Prosecutor and the defence, is not entitled a of right to address the Chamber but is required to make an application in writing to the Registrar who shall transmit it to the relevant Chamber. Compare also **Calvo-Goller**, **K. N.** (2006). The Trial Proceedings of the International Criminal Court ICTY and ICTR Precedents. Leiden, Boston, Martinus Nijhoff Publishers. At page 244.

[810] See Rule 91(1).

Rule 89 seem to suggest that the modification of a ruling would require an additional application.[811]

As already mentioned, under Rule 89(4) multiple applications may be grouped and considered together by the Court, which may thereafter issue one decision.

The basic principles regarding the modalities and extent of participation are dealt with in Art. 68 and Rule 89, where it states that the Court shall permit the victims' views and concerns to be presented[812] and that participation "may include making opening and closing statements". It is not possible to distinguish in great detail between the various types of participation from the wording. In the following section, I shall therefore examine the different ways of participating in detail.

1. Right to attend

According to Art. 64(7) trials are generally to be held in public, unless the Chamber decides, in special circumstances, that certain proceedings should be held in closed sessions. As long as proceedings are held in public, the victim, like the general public, has a right to attend.

A more comprehensive right to attend in non-public proceedings is anchored in the Statute for the accused[813] as well as for the victims' legal representative[814] but not, at least not explicitly, for victims.

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[811] **Bitti**, **G.** and **H. Friman** (2001). Participation of Victims in the Proceedings. The International Criminal Court, Elements of Crimes and Rules of Procedure and Evidence. R. S. Lee. Ardsley, New York, Transnational Publishers**:** 456-474. At page 466.

[812] See Art. 68(3).

[813] See Art. 63.

[814] See Rule 91(2); Even though according to Rule 91(2) the decision if to grant a right to attend lies in the discretion of the Court it can be assumed that the legal representative may in principle attend; see also **Mekjian**, **G. J.** and **M. C. Varughese** (2005). "Hearing the victim's voice: analysis of victims' advocate participation in the trial proceeding of the International Criminal Court." Pace International Law Review **17**: 1-46. At page 18.

An absolute right for victims to attend could maybe emanate from Rule 144. However, Rule 144 only speaks of certain proceedings that will mostly be held public, but not of hearings or sessions. Furthermore, Rule 144 requests the victim or his or her legal representative to attend without emphasizing that it would be preferable that the victim should participate. Rule 144 also only requests attendance "wherever possible", without creating an absolute right. Looking at the overall context and the scheme of the Statute, the fact that Rule 91 provides for a right of attendance for the legal representative but not for the victim, also indicates, that the drafters did not intend to create such a right.

A right to attend personally could then only be taken from the right "to present their views and concerns" in Art. 68, but the right to have victims' views and concerns represented is not explicitly awarded to the victims personally. According to Art. 68(3) the Court can always request that participation be conducted by the legal representative where it considers this appropriate. This, too, underlines the fact that, as a rule, participation and attendance is reserved to the legal representative.

The victim booklet, too, names attending hearings as one of the examples of a way in which the legal representative of victims, not the victims themselves may participate.[815]

Trial Chamber I has decided that the Trial Chamber may, *propriu motu*, or on request by any parties or participants, permit victims to participate in closed and *ex parte* hearings, depending on the circumstances. Whether or not participation by victims could exceptionally encompass hearings that are *ex parte* was an issue that could only be resolved by reference to the facts of the particular application. The above applied *mutatis mutandis* with regard to the right of victims to make confidential or *ex parte* written submissions.[816]

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[815] See victim booklet, page 13.

[816] See Trial Chamber I, Situation in the Democratic Republic of the Congo in **Prosecutor v. Thomas Lubanga Dyilo,** Decision on victim's participation of 18 January 2008, Case No ICC-01/04-01/06, para.113.

This, altogether leads to the conclusion that the victims' rights to attendance is restricted to public proceedings, they can only attend non-public proceedings through their legal representative.

The legal representative's attendance, can also be restricted in the decision of the Court to let victims participate or can be revoked at any time.

2. Statements

The option for victims to make "statements" is not mentioned explicitly in Art. 68 which only mentions "presenting views and concerns". However, Rule 89 states that opening and closing statements are among the possible forms of participation that the Court can allow. The word "statement" suggests that oral participation is what is envisaged.

On the one hand, the wording of Rule 89 does not specify in any further detail the manner in which opening or closing statements may be made or their permissible content. Furthermore, it is questionable whether Rule 89 only allows for the making of opening and closing statements, or whether other statements are also permitted.

With regard to the first question an opening statement may give a victim the opportunity to speak freely and in person before the Court at an early stage of the trial proceedings. Such a statement may have an elucidating effect and if the person is actually permitted to speak freely and without constraints, may also serve to fulfil some of the personal needs of the victim in question.

Whether victims are allowed to speak freely and for how long will depend heavily on the number of statements admitted and on the time provided for such statements, naturally also having regard to the rights of the accused.[817]

Trial Chamber I has considered that Rule 89(1) of the Rules is clear in its effect when it provides that victims' participation may include opening and closing statements, particularly given this is not inconsistent with any other part of the Rome Statute

[817] Thereto see below, pages 189 et seq.

framework. The Trial Chamber would consider in due course the request of some victims to make one-hour opening and closing statements during the trial.[818]

In the closing statement, victims may also have the right to speak freely, they may for instance express how they have perceived the proceedings, express their satisfaction or dissatisfaction with the process or emphasize the points that in his or her view are important for the decision.

As the closing statement will precede the determination of the sentence, victims can, among other things, allude to the factors mentioned in Rule 145(1)(c) and (2)(b). Such a statement can be of importance insofar as according to Art. 78, Rule 145 the judges before the ICC shall take those factors into account for sentencing. Of course, victims may mention this, during sentencing again, but only if there is a hearing held, which according to Art. 76(2), will not always be the case. Indeed, the victim does not have any influence over whether a hearing will be held.

It is questionable whether in the closing statement the victim may also apply for or propose a certain sentence beyond describing the harm he or she has suffered. Such a facility would open the door for direct retribution by the victim. This is, however, not one of the goals of victim participation.[819] Retribution, even if it is one of the goals of punishment, is left in the hands of the authorities. Victims will thus most probably not be allowed to apply for or propose a certain sentence. At least at first glance, this seems to be the only restriction on the victim's closing statement. It is not apparent from the wording of the Rules that the closing statement should for instance be limited to statements concerning the determination of sentence. However, the statement does have to respect the rights of the accused.[820]

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[818] Trial Chamber I, Situation in the Democratic Republic of the Congo in **Prosecutor v. Thomas Lubanga Dyilo,** Decision on victim's participation of 18 January 2008, Case No ICC-01/04-01/06, para. 117.

[819] See above, pages 45 et seq.

[820] See Art. 68(3), concerning the rights of the accused see in more detail below pages 189 et seq.

Prima facie, it seems that victims have a broad right to speak freely in the opening and closing statements. However, it remains to be seen whether victims will actually take advantage of these rights personally or whether rather the legal representative will make the statements instead. The wording of Rule 89 seems to provide for the option of victims making personal statements. Of course, Art. 68(3) reserves to the Court the right to demand in any situation that victim's participation be conducted through their legal representative. It is also quite telling that in the booklet on victim participation[821] the making of opening or closing statements appears under the heading "The following are some examples among others, of ways in which a legal representative of victims might participate". Especially if victims participate in groups and with a common legal representative it is highly improbable that every single victim may make statements in person. Maybe one or two persons out of a group may make a statement but for reasons of equality it seems more likely that in most cases the legal representative will take responsibility for the making of the opening and closing statements.

It is also important to consider whether Rule 89 confines the making of statements to the making of opening and closing statements. In this context one must note first that the wording provides for the formulation "which may include making opening and closing statements". This seems to suggest that it is a non-exhaustive list.[822] As a result, this has been interpreted as indicating that the Court should also consider participation at hearings and oral interventions. However, opposing views were, it seems, expressed in the Working Group as to the general appropriateness of allowing victims themselves to make oral interventions. Some delegations stressed the importance of allowing victims to appear in person before the Court, while others were concerned that this would not be practicable or appropriate. Ideas put forward by some delegations to further specify how the participation should be organized, i.e., regulating the manner of participation, were abandoned in favour of giving the Chamber the discretion to determine this in its

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[821] See Victim booklet page 16.

[822] See **Stehle**, **S.** (2006). Das Strafverfahren als immaterielle Wiedergutmachung. Frankfurt am Main. At page 310.

ruling.[823] It is thus at the discretion of the Court to decide whether statements will be allowed for and at in which part of the proceedings, but it remains to be seen whether the Court will allow for an extensive use of statements.

It is also doubtful, for the same reasons as stated above, whether a victim may make such statements personally. The language in Rule 91 reflects the concern that the oral proceedings should be left in the hands of professionals. It finds its legal basis in Art.68(3) which provides for the possibility that the "legal representative" of the victims" may present the views and concerns of the victims where the Court considers this appropriate in accordance with the RPE. In addition, victims do not even have a right to attend many parts of the proceedings, it is therefore logical that they would not have a right to make then an oral statement.

3. Observations

A right to make observations is to be found in Rule 91(2). This right is conceptually reserved to the legal representative. As can be seen from the last sentence of Rule 91(2)[824] both written and oral observations are possible.

It is not obvious what distinguishes "observations" from "statements" or "submissions" from the Statute or Rules. It seems that statements have the function of allowing a victim to speak freely[825] while observations in the first instance serve to comment or respond[826]

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[823] See **Bitti**, **G.** and **H. Friman** (2001). Participation of Victims in the Proceedings. The International Criminal Court, Elements of Crimes and Rules of Procedure and Evidence. R. S. Lee. Ardsley, New York, Transnational Publishers**:** 456-474. at page 461; see also **Jorda**, **C.** and **J. de Hemptienne** (2002). The Status and Role of the Victim. The Rome Statute of the International Criminal Court, A Commentary. A. Cassese, P. Gaeta and J. R. W. D. Jones. Oxford, Oxford University Press. **2:** 1387-1419. at page 1413 who suggest to allow the victim to participate in the entire process from the start to finish but to give the judge greater powers to control the proceedings.

[824] Allowing the Prosecutor and the defence reply.

[825] See above pages 171 et seq.

[826] See for instance Legal representative of victims, Situation en république démocratique du Congo Le **Procureur c. Thomas Lubanga Dyilo**, Observations du Représentant légal des victimes VPRS 1 à 6 suite aux observations du Procureur et du Conseil de la défense, au sujet du statut de victime de demandeurs VPRS 1 à VPRS 6 dans le cadre de l'affaire „Le Procureur c. Thomas Lubanga Dyilo" of 31 May 2006, Case No. ICC-01/04-01/06-132 at page 4.

to submissions from other parties.[827] While observations concentrate on questions that have already been made, submissions allow for new topics to be addressed.[828]

The wording of Rule 89 does not subject the right to make observations to conditions, as is the case with, for example the right to pose questions in Rule 89(3). However, this only means that at least written observations will always be possible as long as the rights of the accused are not infringed. According to Rule 91(2), however, the legal representative can always be requested to make written observations. Having said that, standard practice is to let the legal representative make oral observations and any departures from this principle must be justified by reference to the circumstances of the case.[829]

As with the other rights provided for in Rule 91, the right to make observations in the end is always subject to the discretion of the Court which retains full control over the proceedings at all times.

The Chamber has given some indications in its decisions as to whether victims have a right to reply to observations, for instance, of the Defence in accordance with Regulation 24. In one case, it decided that this is not the case if the Chamber already has sufficient information in view of the initial observations of the victims, Defence and Prosecutor.[830]

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[827] See **Garner**, **B. A.** (1999). Black' s Law Dictionary. St. Paul, Minnesota, West Group. At page 213.

[828] See chapter submissions.

[829] See **Bitti**, **G.** and **H. Friman** (2001). Participation of Victims in the Proceedings. The International Criminal Court, Elements of Crimes and Rules of Procedure and Evidence. R. S. Lee. Ardsley, New York, Transnational Publishers**:** 456-474. at page 466 who points that the wording of Rule 91 that differentiates between „attending“ and participating indicates that normally an active role for the legal representative was wanted that includes the right to make oral observations; see also **Mekjian**, **G. J.** and **M. C. Varughese** (2005). "Hearing the victim's voice: analysis of victims' advocate participation in the trial proceeding of the International Criminal Court." Pace International Law Review **17**: 1-46. At page 27.

[830] See Situation in the Democratic Republic of the Congo **the Prosecutor vs. Thomas Lubanga,** Decision on the Arrangements for participation of Victims a/0001/06, a/0002/06 and a/0003/06 at the Confirmation hearing of 22 September 2006, Case No. ICC-01/04-01/06-462-tEN, at page 5.

In the *Lubanga* case the legal representatives of the four victims who had participated in the confirmation of charges where allowed to present their views in written[831] and oral[832] form with regard to all the procedural and substantive issues that arose prior to the actual trial procedure.

4. Submissions

The wording of Rule 91(2) implies that victims have the right to make submissions orally as long as the intervention is not confined to written submissions.[833] It seems therefore, that as with observations, the general rule is to let the legal representative make oral submissions and any departures from this principle must be justified by reference to the circumstances of the case.

Like the right to make observations, this right is also reserved to the legal representative. As already mentioned, the difference to observations is that while observations concentrate on questions that have already been dealt with, submissions allow for the addressing of new topics.[834]

It seems that the insertion of "submissions" into the wording of Rule 91 was a compromise that followed a lengthy discussion in the Preparatory Commissions. The compromise reached aims to provide a general and comprehensive scheme for victims'

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[831] See e.g. the submission of responses to the defence request for interim release of Thomas Lubanga Diylo, Pre-Trial Chamber I, Situation in the Democratic Republic of the Congo in **Prosecutor vs. Thomas Lubanga Dyilo,** Second Review of the "Decision on the Application for Interim Release of Thomas Lubanga Dyilo" of 11 June 2007, Case No. ICC-01/04-01/06.

[832]See e.g. Trial Chamber I, Situation in the Democratic Republic of the Congo in **Prosecutor vs. Thomas Lubanga**, Transcript of 4 September hearing 2007, Case No. ICC-01/04-01/06.

[833] See **Mekjian**, **G. J.** and **M. C. Varughese** (2005). "Hearing the victim's voice: analysis of victims' advocate participation in the trial proceeding of the International Criminal Court." Pace International Law Review **17**: 1-46. at page 27; see for instance legal representative of victims, Situation in the Democratic Republic of the Congo **Prosecutor vs. Thomas Lubanga Dyilo,** written submissions of the legal representative of victim a/0105/06 of 1 December 2006, Case No. ICC-01/04-01/ 745-tFR at page 2, where it is being refered to a joint oral submission.

[834] See above chapter observations.

participation at trial. The purpose of the amendment was to give the legal representative a more active role, thus allowing for comments and the initiation of questions. [835]

In contrast to the possibility to pose questions in Rule 91(3), it seems, that no direct questions to witnesses or experts are to be submitted in submissions. Instead, only legal issues are to be presented to the Chamber.

Interestingly, the French text of the Rules of Procedure and Evidence uses the term "conclusions" in Rule 91(3). In French law this term is used in a very comprehensive way, it not only implies that new topics may be addressed but also suggests that it is possible to submit evidence.[836] With regard to submitting evidence it seems, however, that this is not allowed under the provisions of the ICC.[837] The French text, however, confirms that the legal representative is given a more active role, principally with the possibility to make submissions, thus allowing for comments and the initiation of questions.

The power to make submissions, as with all other powers of the victim, must be exercised within the framework of the criminal proceedings as provided for in the Statute and Rules and especially in accordance with the rights of the accused.

While with regard to observations Rule 91 explicitly provides for a right of reply for the Prosecutor and Defence, a similar right is not to be found in Rule 91 for submissions. It has been stated that in practice such a right will nevertheless be warranted.[838] Objections

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[835] See **Mekjian**, **G. J.** and **M. C. Varughese** (2005). "Hearing the victim's voice: analysis of victims' advocate participation in the trial proceeding of the International Criminal Court." Pace International Law Review **17**: 1-46. At page 28; see also **Bitti**, **G.** and **H. Friman** (2001). Participation of Victims in the Proceedings. The International Criminal Court, Elements of Crimes and Rules of Procedure and Evidence. R. S. Lee. Ardsley, New York, Transnational Publishers**:** 456-474. At page 466.

[836] Compare **Bitti**, **G.** and **H. Friman** (2001). Participation of Victims in the Proceedings. The International Criminal Court, Elements of Crimes and Rules of Procedure and Evidence. R. S. Lee. Ardsley, New York, Transnational Publishers**:** 456-474. At page 466, footnote 97.

[837] See above Chapter "evidence".

[838] See **Stehle**, **S.** (2006). Das Strafverfahren als immaterielle Wiedergutmachung. Frankfurt am Main. At page 315 who states that even if not provided for in the Statute and Rules, most probably the Prosecutor and Defence will be given a right to respond.

have been raised against this as this was first of all not provided for in the wording of the rule and second, because the ability to respond to submissions was limited by the fact that some submissions may be dealt with *ex parte*.[839] It is nevertheless reasonable to believe that the Court would communicate most submissions to the Prosecutor and the Defence, even if it is not formally required to do that, since this would reflect good practice in criminal proceedings.[840]

It has indeed been stated by the Court that under Regulation 24, the Prosecutor and the Defence may file a response to any document filed by any participant in the proceedings.[841] Whether this would relate to submissions is also not evident. It seems, however, that a right to reply will be the rule rather than the exception.

Submissions can also be made pursuant to Rule 93. Rule 93 enables the Court to seek the views and concerns on "any issue", should it decide to do so. Examples are listed of the types of issues on which submissions may be sought.[842] It is only a list of examples but shows which procedural decisions are of interest for victims from the point of view of the drafters of the Statute and Rules and therefore can also be considered for the purpose of participation under Rule 89.

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[839] See **Bitti**, **G.** and **H. Friman** (2001). Participation of Victims in the Proceedings. The International Criminal Court, Elements of Crimes and Rules of Procedure and Evidence. R. S. Lee. Ardsley, New York, Transnational Publishers**:** 456-474. at page 467; **Mekjian**, **G. J.** and **M. C. Varughese** (2005). "Hearing the victim's voice: analysis of victims' advocate participation in the trial proceeding of the International Criminal Court." Pace International Law Review **17**: 1-46. At page 28.

[840] **Bitti**, **G.** and **H. Friman** (2001). Participation of Victims in the Proceedings. The International Criminal Court, Elements of Crimes and Rules of Procedure and Evidence. R. S. Lee. Ardsley, New York, Transnational Publishers**:** 456-474. At page 467.

[841] See PTC I, Decision in the Democratic Republic of the Congo **Prosecutor vs. Thomas Lubanga Dyilo,** Decision Authorising the Prosecutor and the Defence to Respond to the Observations of the Legal Representatives of the Victims regarding the Manner in which Victims a/0001/06, a/0002/06 and a/0003/06 are to Participate in the Confirmation Hearing of 10 August 2006,Case No. ICC-01/04-01/06-319-tEN at page 3.

[842] Rule 93 mentions the review of a decisions of the Prosecutor not to initiate an investigation (see Rules 107, 109), the decision to hold the confirmation hearing in the absence of the person concerned (Rule 125), the decision on the amendment of charges (Rule 128), the decision to join or separate trials (Rule 136), the decision on admission of guilt (Rule 139) and the possible assurance provided by the Court to an expert or witness that he or she will not be prosecuted, detained or subjected to any restriction of personal freedom by the Court in respect of any act or omission that preceded the departure of that person from the requested State. (Rule 191).

Rule 93 allows not only the views of participating victims but also of "other victims" to be sought. The Court has discretion in deciding whether to admit views of others rather than those who successfully applied for participation and will probably only exercise it in granted exceptional circumstances.[843]

5. Ask questions to witnesses/experts/accused

A right to examine a witness, expert or the accused is provided for principally in Rule 91(3)[844], but is exercisable only by the legal representative.[845]

With regard to examination of the accused it has been stated that Rule 91(3) does not grant victims a general right to examine the accused, rather it has been suggested, the Rule only applied to **testimony**. Thus, it is was only in the exceptional case of the accused being heard as a witness that victims can request the permission of the Chamber to examine him. Granting the victims a right to examine the accused would constitute a clear violation of his fundamental right to silence as guaranteed by Art. 67(1)(g). Such a restriction is not obvious from the wording of Rule 91(3) itself. As the Defence has stated it is very exceptional for the accused to be heard as a witness, therefore one may suppose that if it was only meant to apply to this narrow category of cases it had been further clarified. Furthermore, the author does not agree with the assertion that the accused's right to silence would be violated by such a course. A right to silence does not mean that the accused may not be questioned, it only means that the accused is not compelled to answer and this right is not infringed. Such a restriction is, in the view of the author, also not necessary

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[843] See **Timm**, **B.** (2001). The Legal Position of Victims in the Rule of Procedure and Evidence. International and National Prosecution of Crimes under International Law. H. Fischer, C. Kreß and S. R. Lüder. Berlin, Berlin Verlag**:** 289-307. at page 301; **Bitti**, **G.** and **H. Friman** (2001). Participation of Victims in the Proceedings. The International Criminal Court, Elements of Crimes and Rules of Procedure and Evidence. R. S. Lee. Ardsley, New York, Transnational Publishers**:** 456-474. At page 473.

[844] See **Harhoff**, **F.** (2001). The Role of the Parties Before International Criminal Courts in Light of the International Criminal Tribunal for Rwanda. International and National Prosecution of Crimes under International Law. H. Fischer, C. Kreß and S. R. Lüder. Berlin, Berlin Verlag**:** 640 et seq. At page 649.

[845] See **Bitti**, **G.** and **H. Friman** (2001). Participation of Victims in the Proceedings. The International Criminal Court, Elements of Crimes and Rules of Procedure and Evidence. R. S. Lee. Ardsley, New York, Transnational Publishers**:** 456-474. At page 467.

insofar as the rights of the accused are expressly mentioned in Rule 91 and will be considered by the Chamber in deciding if questions are admissible or not.

The reference in Rule 91(3) to Rules 67 and 68 means that questioning may also take place when audio or video-link technology is used or in connection with prior recorded testimony. Any questioning by the legal representative must be preceded by a separate request to the relevant Chamber, which may also request to be informed of the questions that the representative plans to ask. The questions shall then be communicated to the Prosecutor and, "if appropriate" to the Defence for observations within a time limit set by the Chamber.

The intervention of questioning is tempered by Rule 91(3)(b), which requires the Chamber to issue a ruling in which it has to balance and "take into account the stage of the proceedings, the rights of the accused, the interests of the witnesses, and the need for a fair, impartial and expeditious trial as stated under Art. 68(3)". The ruling may include directions on the manner and order of the questions and the production of documents in accordance with the powers of the Chamber under Art. 64. The latter condition was added to make sure that the principles of how the trial shall be conducted would always be observed. In particular Rule 140, which underpins Art. 64 and provides, *inter alia*, that in all cases the Defence shall have the right to be the last to examine a witness, was considered important to uphold. [846]

The Chamber may further, if it considers it appropriate, put questions to the witness, expert or accused on behalf of the victim's legal representative.

Sub-rule 4 specifies that the restrictions on questioning by the legal representative set forth in sub-rule 3 do not apply to a hearing limited to reparations. Instead, the legal representative may question witnesses, experts and the person concerned, i.e., the convicted person. However, the permission of the Chamber is still required to do so.

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[846] See **Human Rights Watch**. Commentary to the third Preparatory Commission Meeting on the International Criminal Court, at http://www.iccnow.org/documents/prepcom/papersonprepcomissues/HRWComment3rdPrepComNov99.pdf.

In the Preparatory Commissions Rule 91(3), in its current form, had been preceded by a less restrictive proposal regarding the right to ask questions in the trial proceedings. However, various concerns were then raised by some delegations which opposed a general right to examine. Among these concerns were that a "third party" in the form of victims would be created next to the prosecution and the accused, that the rights of the accused would be violated or that the role of the independent prosecutor would be threatened.[847] To the first proposal the need to "ask permissions" through application[848] and the balancing test in sub-rule 3 was thus amended.

The right to question though strongly depends on the way the Chamber exercises its control over it.[849] The Court's control over the questions which are posed may be necessary for the fair and expeditious conduct of the proceedings. If the Chamber rejects unfair questions or filters questions that have already been asked by the Prosecutor thereby also avoiding repeated appearances of witnesses before the Court will most probably be in the interest of all participants. The Chamber should, however, ensure that it does not protect these interests too zealously thereby completely blockading questioning on the part of the victims. Their right to question is already much weaker than that of other parties to the process. As a result, fears have been expressed that the Chamber is unlikely to authorise the victim's representative to orally question or even cross-examine witnesses, although it does have the power to do so. [850] So far, the ICC has in its decisions shown that the possibilities provided for in the Statute and Rules are actually being used so that such fears as yet appear to be unfounded. Still, the right might be limited in various ways and it is probable that the Court will not readily grant victims the right to cross-examination witnesses.

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[847] See **Mekjian**, **G. J.** and **M. C. Varughese** (2005). "Hearing the victim's voice: analysis of victims' advocate participation in the trial proceeding of the International Criminal Court." Pace International Law Review **17**: 1-46. At page 28.

[848] With the goal to limit superfluous litigation

[849] The power to control emanates from Art. 64 which gives far-reaching powers to the Chamber.

[850] **Garkawe**, **S.** (2003). "Victims and the International Criminal Court: Three major issues." International Criminal Law Review **3**: 345-367. Pages 361, 362.

Another important issue is the duty to communicate the questions to the Defence. This allows the Defence to prepare for the questions, which undermines the desired effect. It depends on the Chamber's interpretation of the words "as appropriate" if the communication to the Defence will generally apply or only do so in exceptional circumstances. It is submitted here that the latter should apply.

The possibility of putting the questions to the witness, expert or accused on behalf of the victim's legal representative should only be used in exceptional circumstances. Certain national proceedings are prime examples of systems where the right to ask direct questions is given importance.[851] The reason for this is obvious - the Chamber will probably not use the same rhetoric as the victims' legal representative nor will it always dig as deep or follow the same line of argumentation as the victim or his or her legal representative. The possibility to ask direct questions is a very important tool and should not be restricted in too many ways.

6. Right to submit evidence

The Statute assumes that the parties are principally responsible for submitting evidence [852] and may also direct the manner in which the evidence shall be submitted.[853] At the same time, the Trial Chamber may, according to Art. 64(6)(b), (d) and Art. 69(3), order the production of evidence in addition to that already collected prior to the trial or presented during the trial by the parties.

As victims are not parties in the strict sense of the term, it seems that the right to submit evidence does not apply to them, that they are not entitled to call witnesses or experts to

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[851] In Germany for instance the subsidiary prosecutor is explicitly given the right to directly question, he is awarded the same rights as the prosecutor, compare §§ 397(1), 240(2) of the German Code of Criminal Procedure; in France the legal representative of the *partie civile* is also awarded the same rights to directly question as the prosecutor, see Art. 120 of the French Code for Criminal Procedure.

[852] See Art. 64(3)(c),(6)(d),(8)(b), 67(1)(e),(2), 69, (3).

[853] See Rule 140(1).

testify in the criminal proceedings.[854] Conversely, the Chamber will most probably only order the production of evidence from the parties and not from the victims.

It has been stated that the broad terms "views and concerns", which like all the language of the first sentence of Art. 68, is taken from the 1985 UN Declaration on Victims' Rights, is inclusive enough to allow victims (or their representatives) to bring before the Court elements of evidence upon which they wish to express views or concerns.[855] Such an interpretation of the Rules may be doubted insofar as a right to submit evidence was clearly not provided for in the Statute. It would, therefore undermine the intentions of the drafters. There was consideration of a right of victims, through their legal representatives, to present evidence, but this was abandoned at a later stage in the Preparatory Commissions.[856] Correspondingly, the right to make submissions pursuant to Rule 91(2) cannot be interpreted as containing a right to submit evidence either, thus the Chamber is obliged to consider it. The inclusion of the word "conclusions" in the French version of the Rules of Procedure and Evidence may give rise to confusion, as in French law this wording implies that evidence may be submitted.[857] However, as already stated, this right was explicitly not provided for at the ICC.

Of course the right to make submissions should in principle include the possibility of requesting the Chamber to order the production of certain evidence. It would then be up to the Court to decide if it would do so or not. In the application form victims are already asked to give the names and addresses of witnesses known to them.[858] This shows that the

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[854] See **Bitti**, **G.** and **H. Friman** (2001). Participation of Victims in the Proceedings. The International Criminal Court, Elements of Crimes and Rules of Procedure and Evidence. R. S. Lee. Ardsley, New York, Transnational Publishers**:** 456-474. at page 466; see also **Scomparin**, **L.** (2005). Il ruolo della vittima nella giurisdizione penale internazionale: alla ricerca di una possibile mediazione fra modelli processuali. Problemi Attuali Della Giustizia Penale Internazionale. A. Cassese, M. Chiavario and G. De Francesco. Torino, Giappichelli Editore**:** 365-398. at page 375; **Bassiouni**, **M. C.** (2006). "International Recognition of Victims' Rights." Human Rights Law Review **6**(2): 203-279. At page 245.

[855] See **Donat-Cattin**, **D.** (1999). Art. 68 "Protection of victims and witnesses and their participation in the proceedings". Commentary on the Rome Statute of the International Criminal Court Observers´Notes Article by Article. O. Triffterer. Baden-Baden, Nomos Verlagsgesellschaft. At page 880.

[856] See A/CONF.183/C.l/WGPM/L.58/Rev. l, p 2 (draft article 68).

[857] See above.

[858] See application form page 10.

Court also has an interest in considering the evidence attributed to him or her which does not necessarily mean that the Court will consider all evidence especially in cases where many victims ask for evidence to be considered.

Another possibility is of course that victims can always inform the Prosecutor of certain matters or their concerns without having any possibility to compel him or her to act upon this information.

Of course it can be argued that if evidence is important for the case and the victim informs the Prosecutor and Chamber of this fact the evidence will probably be considered anyway. Still, as the victim may have a different focus, a direct possibility to submit evidence could give a different course to the proceedings.

Art. 3 of the European Framework Decision grants victims a "right to supply evidence"[859]

In some national jurisdictions victims may also submit evidence[860], and legal scholars also regard it as essential for a proper conduct of a case[861]. Any attempt to classify this as a "general principle of law" is, however, misguided as in other countries the practice is different. A comparison is further only partially advisable as victim participation before the ICC does not have the same quality as in those countries described, where victims may participate as parties to the proceedings. Furthermore the way in which evidence is submitted is also different in the countries described.

In the 18 January 2008 decision, Trial Chamber I, when specifying where and how victims may participate in trial, held, for instance, that victims "may be permitted to tender and examine evidence if in the view of the Chamber it will assist in the

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[859] See EU Framework Decision of 15 March 2001, 2001/220/JHA, http://eur-lex.europa.eu/LexUriServ/site/en/oj/2001/l_082/l_08220010322en00010004.pdf.

[860] See for instance Art. 101 of the Spanish Code of Criminal Procedure. See generally United Nations Office for Drug Control and Crime Prevention, Handbook on Justice for Victims: On the Use and Application of the Declaration of Basic Principles of Justice forVictims of Crime and Abuse of Power (NewYork, 1999), see also §§ 397 para.1, 244 paras. 3-6 of the German Code of Criminal Procedure.

[861] With regard to national solutions it has been stated that to present evidence is essential for victims for being able to conduct proceedings effectively, see for instance **Pfeiffer**, **G.** (2003). Karlsruher Kommentar zur Strafprozessordnung. München, C.H. Beck. At page 325.

determination of truth, and if in this sense the Court has "requested" the "evidence". They are allowed to put appropriate questions whenever the evidence under consideration engages their personal interests.[862]

The Trial Chamber considered that the right to introduce evidence during the trial before the Court was not limited to the parties. Furthermore, the Chamber would not restrict questioning by victims to reparations issues, but instead would allow appropriate questions to be put by victims whenever their personal interests was engaged by the evidence under consideration.

As regards the request of victims' legal representatives to have the opportunity to challenge the admissibility of relevance of evidence when their interests were engaged, the right to make submissions on matters of evidence was not reserved to the parties.[863]

The Prosecutor has consistently opposed the interpretation of the Court. In its request for leave to appeal the Trial Chamber's decision above, the Prosecutor wrote that the Trial Chamber "provides for modalities of participation that go further than the expression of views and concerns as defined by Art. 68(3) of the Rome Statute".[864]

The Appeals Chamber affirmed the Trial Chamber's more broad interpretation of "views and concerns". The Appeals Chamber noted that "it is important to underscore that the right to lead evidence pertaining to the guilt or innocence of the accused and the right to challenge the admissibility of evidence in trial proceedings lies primarily with the parties, namely the Prosecutor and the Defence."[865] It determined, however, that provisions of the

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[862] See Trial Chamber I, Situation in the Democratic Republic of the Congo in **Prosecutor v. Thomas Lubanga Dyilo,** Decision on victim's participation of 18 January 2008, Case No ICC-01/04-01/06, para. 108.

[863] See Trial Chamber I, Situation in the Democratic Republic of the Congo in **Prosecutor v. Thomas Lubanga Dyilo,** Decision on victim's participation of 18 January 2008, Case No ICC-01/04-01/06, paras. 108 et seq.

[864] See Trial Chamber I, Situation in the Democratic Republic of the Congo in **Prosecutor v. Thomas Lubanga Dyilo,** Application for Leave to Appeal Trial Chamber I's 18 January 2008 Decision on Victims' Participation of 28 January 2008, Case No. ICC-01/04-01/06.

[865] Appeals Chamber, Situation in the Democratic Republic of the Congo in **Prosecutor v. Thomas Lubanga Dyilo**, Judgment on the appeals of The Prosecutor and The Defence against Trial Chamber I's

Rome Statute quoted by the Prosecutor do not "preclude the possibility for victims" to participate in these ways. [866] It explained that "if victims were generally and under all circumstances precluded from tendering evidence realating to the guilt or innocence of the accused and from challenging the admissibility or relevance of evidence, [the victims'] right to participate in the trial would potentially become ineffectual.[867]

The Court has thereby taken a relatively broad view, restricting the possibilities to present evidence only in the way that it has to be "requested". This restriction may, however, be a very strong one. It therefore remains to be seen whether victims will in reality be able to exert any effective influence over the proceedings.

It may indeed be a serious problem for victims before the ICC if they will not be formally empowered to call their own witnesses to testify, or to apply to the Prosecutor or the Court for the production of certain items of evidence, their interventions may carry little weight and have little credibility compared with those of counsel for the parties.[868] Evidence presented during the trial may also become relevant in determining subsequent reparations.

Of course, in an international context due to the possibly large numbers of victims, regard must also be had to the expeditious conduct of the proceedings. Still, the impact of victim participation may be seriously diminished if not only victims do not have access to prosecution or defence evidence but may not submit their own evidence either.

Decision on Victims' Participation of 18 January 2008 of 11 July 2008, Case No. ICC-01/04-01/06 OA 9 OA 10, at para. 93.

[866] Appeals Chamber, Situation in the Democratic Republic of the Congo in **Prosecutor v. Thomas Lubanga Dyilo**, Judgment on the appeals of The Prosecutor and The Defence against Trial Chamber I's Decision on Victims' Participation of 18 January 2008 of 11 July 2008, Case No. ICC-01/04-01/06 OA 9 OA 10, at para. 95.

[867] Appeals Chamber, Situation in the Democratic Republic of the Congo in **Prosecutor v. Thomas Lubanga Dyilo**, Judgment on the appeals of The Prosecutor and The Defence against Trial Chamber I's Decision on Victims' Participation of 18 January 2008 of 11 July 2008, Case No. ICC-01/04-01/06 OA 9 OA 10, at para. 97.

[868] **Jorda**, **C.** and **J. de Hemptienne** (2002). The Status and Role of the Victim. The Rome Statute of the International Criminal Court, A Commentary. A. Cassese, P. Gaeta and J. R. W. D. Jones. Oxford, Oxford University Press. **2:** 1387-1419. At page 1413.

7. Right to consult the records

Neither the Statute nor the Rules further elaborate on the question if victims may have access to the evidence.[869] The Statute contains rules for the disclosure of information, especially for information on evidentiary material. It seems, however, that the disclosure rules only pertain to the "parties" but not to victims who are no parties in the strict sense.[870] Rule 81 and 82 of the ICC Rules dealing with the confidentiality of documents collected by the Prosecutor during the investigation at least suggest that victims may not have access to the investigative files. As a result, the PTC has so far ordered the Prosecution and the Defence to identify the documents on their respective lists of evidence that are not confidential.[871]

Furthermore, victim participation is accompanied by a right to consult the records of the proceedings while they are participating in the proceedings according to Rules 89 to 91,[872] as long as the victim in question has made a successful application for participation previously. The right to consult the records in Rule 131 is granted explicitly to victims or their legal representative.

The Registry, according to Rule 121(10) must maintain a full record of all proceedings before the Pre-Trial Chamber, including all documents transmitted to the Chamber pursuant to Rule 121 and this record can be consulted by victims. However, it should not be forgotten that the right to consult the records is limited by Rule 131 where it is made "subject to any restrictions concerning confidentiality and the protection of national

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[869] See also **Aldana-Pindell**, **R.** (2004). "An Emerging Universality of the Justiciable Victims' Rights to the Criminal Process to Curtail Impunity for State-Sponsored Crimes." Human Rights Quarterly **26**: 605-686. At page 660.

[870] See Art. 61(3)(b) of the Statute and Rules 76, 77 and 121; see also **Jorda**, **C.** and **J. de Hemptienne** (2002). The Status and Role of the Victim. The Rome Statute of the International Criminal Court, A Commentary. A. Cassese, P. Gaeta and J. R. W. D. Jones. Oxford, Oxford University Press. **2:** 1387-1419. at page 1411.

[871] See PTC I, Situation in the Democratic Republic of the Congo **Prosecutor vs. Thomas Lubanga Dyilo**, Defence's Information on the access to the public documents on the Defence's List of Evidence granted to the Legal Representatives of the Victims Counsel for the Defence of 17 November 2006, Case No. ICC-01/04-01/06-716.

[872] See Rule 131(2).

security information". This restriction will probably play an important role in future cases, especially in the early stages of the proceedings. As has already been stated, victims do not benefit from the disclosure rules, which indicates that they may not receive as comprehensive information as the parties.

The Prosecutor has in one case[873] submitted that any decision on this particular issue had to have regard to the need to protect the confidentiality of information and the safety and well-being of victims and witnesses. Such a decision should also be mindful of the dangers of further dissemination of sensitive information – even beyond the circle of participants to the judicial case- which would be capable of endangering persons or the integrity of ongoing investigations. Victims are not, for instance, given access to exculpatory materials disclosed by the Prosecution to the Defence under Article 67(2), or inspection materials accessed by the parties under Rules 77 and 78, since these were elements of the processes of transmission of material that took place solely *inter partes*, and were only reflected in the record by means of the reports filed with the Chamber.

Victim participants should access the public record of proceedings, including the document containing the charges, once filed. The only evidentiary material that formed part of the court record in the present case was the material on which the Prosecution intended to rely at the confirmation hearing. In relation to this material, the Prosecution recalled that the Single Judge had already decided that such filings of evidence "should be classified as confidential for the time being." For the reasons set out, the Prosecution submitted that the victims should not currently have access to the confidential filings. The Prosecution only accepted that the victims may have access, in due course, to any evidentiary material filed with the Chamber pursuant to Rule 121 which was not of a confidential character. [874]

Trial Chamber I has decided that due to the fact that confidential filings within the record often contain sensitive information related to the national security, protection of victims

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[873] Albeit for the stage of pre-trial.

[874] See Prosecutor, Situation in the Democratic Republic of the Congo **Prosecutor vs. Thomas Lubanga Dyilo,** Prosecution's Response to "Observations concernant les modalités de la participation des Victimes" of 25 August 2006, Case No. ICC-01/04-01/06-353, paras. 26 et seq.

and witnesses, and the prosecution's investigations, the presumption will be that the legal representatives of victims shall have access only to public filings. However, if confidential filings were of material relevance to the personal interests of participating victims, consideration should be given to providing this information to the relevant victim or victims, so long as it will not breach other protective measures that need to remain in place.

The Trial Chamber reiterated its general approach set out in the order on notification of filings of 19 November 2007 that "the party or participant filing a document bears responsibility for determining the appropriate recipients." Accordingly, confidential filings which included the names of the legal representatives of the victims on their cover should also be notified to the victims by the Registry.[875]

Even if this opinion may not completely match what will be common practice before the ICC, it shows already, that victims will not have unlimited access to the records. It will have to be awaited if the practice will rather tend to be like in common law where mostly such a right is not awarded because of the danger that the balance between Prosecution and Defence is disturbed.[876] Or if the situation could instead be like in many civil law countries, where full information is given.[877] In any case, it is not possible to discern a „general practice" from the national practice.

In this regard it will also be interesting to see whether the judges of the Trial Chamber will be allowed full insight into the records. For if the Trial Chamber has full insight into the records, it may be possible to determine more precisely how much information victims should be allowed to access without infringing upon the rights of the accused. This question has not been explicitly ruled out in the Statute.

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[875] Trial Chamber I, Situation in the Democratic Republic of the Congo in **Prosecutor v. Thomas Lubanga Dyilo,** Decision on victim's participation of 18 January 2008, Case No ICC-01/04-01/06, paras. 105 et seq.

[876] Compare **Stehle**, **S.** (2006). Das Strafverfahren als immaterielle Wiedergutmachung. Frankfurt am Main. At pages 113 et seq., page 264.

[877] Ibid.

It seems, however, that the record will also be given to the Court as it is in the hands of the Registry which is formally subordinate to the Chamber. If the Chamber wants to conduct its tasks out of Art. 64 effectively[878] it needs to be able to inspect the records. As already stated, the Chamber itself needs to see the record before it can rule on the matter of victim participation and the level of their access to the records.

It is therefore not yet clear how far-reaching victims' rights to consult the records will be. It should though be noted, that this right is essential for the conduct of their case. The transparency of proceedings further has strong influence on the fact how victims may perceive their treatment.

8. Other possible rights

Art. 67(b) provides for a right to have adequate time and facilities for preparation of Defence . There is no such right for victims. Of course, the situation of preparing a defence on the one hand or preparing an application for victim participation is different in many ways. Nevertheless, adequate time and facilities will also be needed by victims or their legal representatives. However, it may be presumed from what has been found in respect of financing of legal representative for victims, that victims will not have the same facilities at their disposal as the accused. It remains to be seen what can be done in this respect in the future.

Rule 26 provides for the possibility to hand in complaints about misconduct of a judge, Prosecutor, Deputy Prosecutor, Registrar or Deputy Registrar. Rule 26 states that "any complaint concerning any conduct defined under rules 24, 25 shall include the grounds on which it is based, the identity of the complainant and, if available, any relevant evidence". It is further stated in sub-rule 2 that all complaints shall be transmitted to the Presidency. The Rule does not, however, specify who may submit a complaint. It may therefore be concluded that every person may do so, including victims. Furthermore, victims do have an interest in doing so, as they are as participants in the proceedings directly affected by misconduct.

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[878] See particularly Art. 64(3)(c) and (6)(d).

There is no further provisions for a victim's influence on the decision about removal from office under Art. 46 besides the complaint.

9. Participation without legal representation

As already identified, the representation by a lawyer is in principle not mandatory for victims before the ICC.[879] However, having examined the extent of participation it has been shown, that victims' rights, especially in the oral proceedings, will typically only be exercised by the legal representatives of victims and not the victims themselves.[880] Thus, even if the possibility exists in theory for victims to represent themselves, in fact it is not wished that they participate without legal representation.[881]

It should further be noted, that the Statute does not give victims a right to translation, unlike the accused.[882] Victims might therefore also be dependent on the help of their representative in this regard.

It is currently not clear which judicial documents are being translated and why. It has been noted that Court has, to date, not translated a significant proportion of its judicial documents. Furthermore, at the time for instance in the Democratic Republic of Congo situation and the Lubanga case, between 5 May 2004 and 27 September only 132 of the 272 documents filed in the public court records (48 percent) were translated. This practice raises issues about the transparency of the Court's work. It could also raise problems relating to the efficiency and fairness of the trial process if

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[879] See Art. 68(3): "Such views and concerns may be presented by the legal representatives of the victims where the Court considers it appropriate, in accordance with the Rules of Procedure and Evidence"; Rule 90.

[880] See thereto in the analysis of the different forms of participation, see also **Timm**, **B.** (2001). The Legal Position of Victims in the Rule of Procedure and Evidence. International and National Prosecution of Crimes under International Law. H. Fischer, C. Kreß and S. R. Lüder. Berlin, Berlin Verlag**:** 289-307. at page 299.

[881] **David**, **E.** (2005). "La participation des victimes au procès devant la Cour pénale internationale." Recueil des cours de l'Académie de droit international **313**: 325 et seq. Para. 4.

[882] See Art. 67(1)(f) where the accused is granted a right to have, free of any cost, the assistance of a competent interpreter and such translations as are necessary to meet the requirements of fairness, if any of the proceedings of or documents presented to the Court are not in a language which the accused fully understands and speaks.

parties to cases are not fluent in both working languages of the Court.[883] This applies all the more to victims who do not have the same rights to translation as the accused. If they want to participate without legal representative they will certainly not be able to follow the course of the proceedings.

In 2005 the Assembly had approved a significant budgetary increase to meet the translation and interpretation requirements of the Court. Still, it does not seem to be clear how these resources are being allocated and used, especially in relation to trial documents. [884]

From this it has been concluded that although the Statute does not say so explicitly, victims may not represent themselves before the ICC unless the victim meets the conditions to serve as counsel for the defence.[885] It is doubtful if the possibility to participate without legal representative will be made a condition to a person's qualification as victim *per se*. However, it is true that the participatory rights are so limited that *de facto* victims cannot participate without representation.

Due to the complexity of the proceedings it is naturally very advisable for victims to consult a lawyer. However, the pressure to do so combined with the fact that financial aid is scarce, leaves it open to much criticism. Victims should have the choice whether they want to take part personally or through legal representation.

10. Not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial

According to Art. 68(3), victims' views and concerns may not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.

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[883] See **CICC**, Comments on the Proposed Programme Budget for 2007 of the International Criminal Court and other matters (2006). Para. 48.

[884] See Ibid.

[885] See **Calvo-Goller**, **K. N.** (2006). The Trial Proceedings of the International Criminal Court ICTY and ICTR Precedents. Leiden, Boston, Martinus Nijhoff Publishers. At page 248.

Art. 68 does not give further examples of the way in which different interests are to be balanced and how much weight is to be given to the distinct interests.

The rights of the accused are dealt with in Art. 67.

The accused's right to be tried without undue delay is the right most obviously jeopardized by victim participation especially when large numbers of victims apply to participate.[886] Other relevant problems have been seen in the fact that the accused risks double prosecution though endangering his rights to a due process and that the prosecutor's duty to try a case without it being jeopardized with unnecessary interference from the victims' advocate could be at stake.[887] On the other hand, the victims' right to ensure prosecutions' due diligence, must also be protected.

Proposals as to how the different interests can be preserved include the idea that participation of the victims' advocate should be limited in cases where his or her participation becomes superfluous or inefficient.[888] This raises the question of how to decide what is "superfluous" or "inefficient". The idea that judges could not allow a certain intervention of the victims' representative when its content consists of arguments already integrally presented by the Prosecutor[889] is logical. However, beyond this it seems uncertain what is "superfluous" or "inefficient" and may endanger the position of the victims. The Court will have to deal with the question of how to interpret the aims and objectives of victim participation in order to answer these questions.

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[886] See Art. 67(1)(c), see also **Donat-Cattin**, **D.** (1999). Art. 68 "Protection of victims and witnesses and their participation in the proceedings". Commentary on the Rome Statute of the International Criminal Court Observers´Notes Article by Article. O. Triffterer. Baden-Baden, Nomos Verlagsgesellschaft. At page 881.

[887] **Mekjian**, **G. J.** and **M. C. Varughese** (2005). "Hearing the victim's voice: analysis of victims' advocate participation in the trial proceeding of the International Criminal Court." Pace International Law Review **17**: 1-46. At page 32.f

[888] Ibid. at page 31.

[889] See **Bitti**, **G.** and **G. González Rivas** (2006). The Reparations Provisions for Victims Under the Rome Statute of the International Criminal Court. Redressing Injustice through Mass Claims Processes: Innovative Solutions to Unique Challenges. Oxford**:** 299-322. At page 310.

It has been said of the duties of the Prosecutor that the Chamber must (a) limit interference with the prosecutor's strategy; (b) prevent jeopardizing a conviction; and (c) ensure that evidence for punitive damages is presented effectively and judiciously. Again, the way to do so would be to eliminate superfluous questions.[890] Reservations have been expressed that since victims and their legal representatives will not have access to the evidence gathered by the parties, or any way of knowing in advance what strategy to pursue other than the examination and cross-examination of witnesses and experts, they will often be incapable of assessing the real content of the arguments and evidence presented at the hearing. Consequently, their participation may undermine the strategy of the Prosecutor, may prejudice his concern to protect the public interest, and even compromise their own interests and considerably delay justice.[891]

As regards the possibility for victims to make statements, this right could interfere with the need for a fair and expeditious trial if the statements are extensive and may be made by several victims. The Chamber will have to decide how many statements it will allow and how long these may be. It may face the problem that these statements are the only means for victims to speak freely and it could be seen as unequal treatment if only few victims are allowed to make such statements. On the other hand it seems foreseeable, that it will not be compatible with the expeditious conduct of proceedings to let all victims speak freely. It will not be easy to an appropriate solution since letting everybody speak but very briefly could be as unsatisfactory as letting only few persons speak.

The right to make a closing statement does not *per se* collide with the right to a fair trial. Even if it might reinforce the accusation levelled at the accused, the accused will always have a right to respond to the statements[892] and also the right to speak last.[893]

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[890] **Mekjian**, **G. J.** and **M. C. Varughese** (2005). "Hearing the victim's voice: analysis of victims' advocate participation in the trial proceeding of the International Criminal Court." Pace International Law Review **17**: 1-46. At page 31.

[891] **Jorda**, **C.** and **J. de Hemptienne** (2002). The Status and Role of the Victim. The Rome Statute of the International Criminal Court, A Commentary. A. Cassese, P. Gaeta and J. R. W. D. Jones. Oxford, Oxford University Press. **2:** 1387-1419. at page 1411; see differently Stehle, page 305 subseq.

[892] See Rule 141(2).

[893] See Rule 141(2).

It is undisputed that in their written form observations and/or submissions pose no problems to the rights of the accused in general as long as there are not so many of them that the Court's work is held up.

With regard to the victims' right to inspect the records, there is indeed one point that could raise difficulties with regard to the rights of the accused: if the victim is to testify later on as a witness in the proceedings[894] there is a danger that the victim might be influenced by already having seen the records. However, it is submitted that this does not in fact justify limiting the victim's right to consult the records, as it is possible for the Chamber to avoid such situations by, for instance, arranging for prior recording of testimony[895], even if the weight of the testimony may be reduced by such a measure.

Another threat to the rights of the accused could be that victims are let participate anonymously for security reasons. This has been the case before the ICC in pre-trial proceedings, but has already been criticized there. In those situations, the rights of the accused could only be preserved by severely limiting victims' rights to participate. Such a measure, however, in the trial proceedings is not desirable at all. It would not only infringe upon the rights of the accused all the more at this stage, but it is also not in the interest of victims because they cannot participate effectively if their rights are cut down as a consequence. It should be possible to protect persons effectively without granting them anonymity in the Trial proceedings. It is only at the post-trial stage that the Court may face some difficulties. However, these are difficulties that were sure to arise in any case, having already experienced similar problems before the ICTs[896], and it can only be hoped that there are the means to cope with them.

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[894] Thereto see below chapter dual status of victims and witnesses.

[895] See Rule 68.

[896] Compare as to experiences before the ICTY **Stover**, **E.** (2005). The Witnesses War Crimes and the Promise of Justice in The Hague. Philadelphia, University of Pennsylvania Press. At page 1 who states victims in some cases were sure that word had already leaked out about his or her testimony… including a neighbour who had returned home to find a death threat spray painted across the windshield; See **Chifflet**, **P.** (2003). The Role and Status of the Victim. International criminal law: developments in the case law of the ICTY. W. A. Schabas and G. Boas. Leiden, Martinus Nijhoff**:** 75-111. At page 89; **Fitzgerald**, **K.** (1997). "Problems Of Prosecution and Adjucation of Rape and Other Sexual Assaults under International Law." European Journal of International Law **8**(4): 638-663. see pages 640, 641;**McDonald**, **A.** (2002). The Role of Victims and Witnesses in International Criminal Trials. Treaty

Finally, when restricting victim participation to preserve the rights of the accused, it should not be forgotten that the Rome Statute and Rules already provide for manifold constraints on participation. Participation should not be reduced to „nothing“. It seems that if the Chamber imposes further restrictions on victim participation above and beyond restrictions already provided for, the latter could end up rather limited. This highlights the fact that there are problems without easy solutions or solutions at all already in the structure of the proceedings before the ICC which ultimately always lead to a precarious limitation of either the rights of the victims or the rights of the accused.

Such a problem could be inherent in the ICC Statute and Rules because while it gives victims an autonomous role and procedural rights it envisages bipolar litigation between the parties[897] thereby potentially causing difficulties. Indeed, it has been stated that if the ICC adopts a very common law based form of proceedings, then any victims' participation provided for in the Statute would be limited by such strict conditions that in practice intervention would be infeasible as it would be difficult to blend the procedural rights of the parties with victims' procedural rights.[898] An essentially accusatorial

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Enforcement and International Cooperation in Criminal Matters with special reference to the Chemical Weapons Convention. R. Yepes-Enriques and L. Tabassi. The Hague, T.M.C. Asser Press**:** 257-276. at page 263; see also **Kim**, **Y. S.** (2003). The International Criminal Court: A Commentary of the Rome Statute. Leeds, Wisdom House. At page 414 reporting the experience that some victims who testified before the ICTR were killed, see also **Donat-Cattin**, **D.** (1999). Art. 68 "Protection of victims and witnesses and their participation in the proceedings". Commentary on the Rome Statute of the International Criminal Court. Observers´ Notes Article by Article. O. Triffterer. Baden-Baden, Nomos Verlagsgesellschaft. At page 871.

[897] See **Tochilovsky**, **V.** (2002). "Proceedings in the International Criminal Court: Some Lessons to learn from ICTY Experience." European Journal of Crime, Criminal Law and Criminal Justice **10**(4): 268-275. at page 268; see also **Jorda**, **C.** and **J. de Hemptienne** (2002). The Status and Role of the Victim. The Rome Statute of the International Criminal Court, A Commentary. A. Cassese, P. Gaeta and J. R. W. D. Jones. Oxford, Oxford University Press. **2:** 1387-1419. At page 1388.

[898] **Tochilovsky**, **V.** (2002). "Proceedings in the International Criminal Court: Some Lessons to learn from ICTY Experience." European Journal of Crime, Criminal Law and Criminal Justice **10**(4): 268-275. at page 273; see also **Tochilovsky**, **V.** (1999). "Rules of Procedure for the International Criminal Court: Problems to address in Light of the Experience of the ad hoc Tribunals." Netherlands International Law Review **46**(3): 343-360. At page 249.

procedure, whereby the trial is conceived as a duel between two adversaries – the prosecution and the defence – indeed leaves little room for a third protagonist.[899]

On the other hand it has been submitted that the difficulties with victim participation are not necessarily linked to the procedural model adopted for trial. For example, in Italy in the new criminal procedural system largely influenced by the principles of the adversarial model, which has been adopted since 1989, victims were left the option of participating in the case as "*partie civile*"[900]. This procedural status enabled victims to verify how proceedings evolved, to present motions and to call and cross-examine witnesses. In other words, the Italian experience proved that it was certainly possible to combine an adversarial procedure with the conspicuous participation of victims in trials. It therefore seems correct to argue that the exclusion of the *partie civile* in the common law world was not due to the procedural model, but was rather linked to a different organization of judicial powers.[901]

Experiences from the ICT's also seem to indicate that the organization of judicial powers is of utmost importance. Judges of the ICTY interviewed by an Expert Group expressed their belief that the prolonged nature of Tribunal proceedings was attributable to a significant degree to not enough control having been exercised over the proceedings by the judges.[902]

One method of resolving the problem deals exactly with this point and suggests giving the judge greater powers to control the proceedings, by entitling him or her to receive from the Prosecutor (at the start of the trial) and from counsel for the Defence (before the

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[899] See **Jorda**, **C.** and **J. de Hemptienne** (2002). The Status and Role of the Victim. The Rome Statute of the International Criminal Court, A Commentary. A. Cassese, P. Gaeta and J. R. W. D. Jones. Oxford, Oxford University Press. **2:** 1387-1419. At page 1388.

[900] See. Arts. 75, 79 of the Italien Code of Criminal Procedure

[901] **Zappalà**, **S.** (2003). Human Rights in International Criminal Proceedings. Oxford, Oxford University Press. At page 225.

[902] See Report of the Expert Group to Conduct a Review of the Effective Operation and Functioning of the International Tribunal for the Former Yugoslavia and the ICTR, UN Doc. A/54/634 of 22 November 1999,para. 77; http://documents-dds-ny.un.org/doc/UNDOC/GEN/N00/230/32/img/N0023032.pdf?OpenElement.

presentation of his or her arguments) the documents assembled by them during the course of their respective investigations. Such a system would have the merit of providing the judge with effective means of making a more informed assessment of the relevance of the parties' respective arguments, thereby enabling him or her to exercise control over the intervention of the victims. In addition, it would guarantee the active involvement of the latter at all of the important stages of the procedure focusing on the delivery of judgment from the moment when the criminal process was first initiated up to the pronouncement of the sentence. At the same time, victims would also have to be given access to the evidence in the case - this giving rise to significant further difficulties as regards the protection of confidential information, and might well render the parties' investigations especially hazardous.[903]

Another suggested alternative – further removed from the spirit of the Rules but more practical – would be to split the hearing into two separate, successive parts. The first part would be essentially adversarial, as provided for by the Statute, and would enable the parties to put forward their respective arguments, with the role of the victims or of his or her representative being limited at the stage to his or her presence in the courtroom, and his or her intervention being restricted to the submission of written observations. The second part would be devoted to the victims: Here they could put forward their views and arguments orally and, where appropriate and with the leave of the Court, call witnesses. This stage of the proceedings would be shorter and much more inquisitorial, since it would be conducted under the strict control of the judge. The presentation of evidence by the parties would thus not be disrupted or delayed by the involvement of a new protagonist, whose powers would be limited to the submission of written observations. The adversarial nature of the exchanges between the Prosecutor and the accused would thereby be preserved.

Following the closure of the oral proceedings, the victim and his or her lawyer, armed with the knowledge of what was said in those proceedings, would be entitled as of a right to put forward their own arguments and call their own witnesses to testify. The judges,

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[903] **Jorda**, **C.** and **J. de Hemptienne** (2002). The Status and Role of the Victim. The Rome Statute of the International Criminal Court, A Commentary. A. Cassese, P. Gaeta and J. R. W. D. Jones. Oxford, Oxford University Press. **2:** 1387-1419. Pp 1411 et seq.

likewise fully informed as to the various aspects of the case, could exercise proper control both over the list of witnesses which the victim or his or her representative wished to call at the hearing and over the testimony given by them before the Court. The strict nature of that control would thus be all the more justified since the victim, unlike the Prosecutor, is not bound to adopt a neutral and detached point of view in relation to the crimes from which he or she has personally suffered.[904]

The latter solution seems too removed from the Statute to be a realistic option for now. Furthermore, it would underline the differences between the systems rather then reconcile them. It is the author's view therefore, that the ICC must find its own, original solution, having regard to the particular features of international law rather then keeping to the one or other national system. Still, the question of the organization of judicial powers will play a crucial role in balancing the rights of the accused and the rights of victims. Indeed, it should be kept in mind that in comparison to the ICTs the ICC already gives more power to the judges in some points[905] and that the ICC has already dealt with the question of organization of powers in its decisions [906] and will return to this topic in the future.[907]

Without any structural adjustment, the danger remains that it will not be possible to balance the rights of the accused and those of the victims but that rather one of the two interests will have to be limited. It seems that in such cases the rights of the accused would prevail[908] when it would be preferable that all rights are given the same weight.

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[904] Ibid. See page 1411 et seq.

[905] See e.g. **Ambos**, **K.** (2006). Internationales Strafrecht. München, C. H. Beck Verlag. At page 275.

[906] See for instance PTC I, **Situation in the Democratic Republic of the Congo,** Decision on the Prosecution's application for leave to appeal the Chamber's decision of 17 January 2006 on the applications for participation in the proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6 of 31 March 2006, Case No. ICC-01/04-135-tEN.

[907] Art. 36, election of judges.

[908] To underline this it can be in Art. 64(2) it is provided that the "Trial Chamber shall ensure that a trial is fair and expeditious and is conducted with full respect for the rights of the accused and due regard for the protection of victims and witnesses." Showing a sligh preference for the rights of the accused.

VI. Binding effect of views and concerns

Art. 68 establishes a dual obligation for the Chamber. On the one hand, it must allow victims to present their views and concerns, and, on the other, it must examine them. The word "examine" already shows that the views and concerns are in no way imperative, the Chamber has to examine the views and concerns but it does not have to follow them if it is not of the same opinion. In the victims' booklet, victims are informed of this fact.[909] On the other hand the wording of Art. 68(3) clearly states the views and concerns shall be considered, another important point is that according to Rule 145 the Court "shall" give consideration to the harm caused to the victims. The drafters at this point did not insert such a word as "may" which would indicate much lesser obligation. The obligation of the Court therefore is one that clearly goes beyond merely listening to the victims.

VII. Plea-bargaining

A new and original approach has been adopted to the topic of plea-agreements before the ICC. The Rules do not exclude plea bargaining in the tradition of common law litigation, yet at the same time, they oblige judges to seek the truth regardless of any agreement reached by the parties.[910]

In contrast to the ICTY where now[911] a plea agreement procedure is explicitly provided for[912], there is no corresponding provision before the ICC. Art. 65(5) of the ICC Statute

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[909] See victim booklet on page 20 where it is stated that "it is important to be aware, however, that putting forward views and concerns will not always result in the Court following the wishes of the victims. In taking its decisions, the ICC judges will be balancing different interests and concerns, including the rights of the defence and the interests of a fair trial.".

[910] See for instance **Ambos**, **K.** (2006). Internationales Strafrecht. München, C. H. Beck Verlag. At page 273.

[911] At its inception, the Yugoslavia Tribunal (ICTY), the first international criminal Tribunal since World War II, declared that plea bargaining was inconsistent with its unique purpose and functions. The crimes within the Tribunal's jurisdiction were simply seen as too reprehensible to be bargained over. Its sister ad hoc, the Rwanda Tribunal (ICTR) followed suit, sentencing Jean Kambanda, former prime minister of Rwanda, to life imprisonment despite the fact that he pled guilty to genocide, enabling the Tribunal to forego a lengthy and uncertain trial. But as the case loads of the ad hoc tribunals expanded exponentially, pressure mounted for them to begin to employ plea bargaining as a means of conserving judicial resources. One of the first international plea bargains occurred in the case of Biljana Plavsic, who had served as deputy to Bosnian Serb leader Radovan Karadzic, and later replaced him as President of the Republika Srpska. Known as the "Serbian Iron Lady".

mentions plea agreements and determines that discussions between the Prosecutor and the Defence regarding modification of the charges, the admission of guilt or the penalty to be imposed shall not be binding on the Court. Agreements are therefore not prohibited and the Rome Statute permits plea agreements when the accused is willing to make an admission of guilt. The number of plea agreements and their repercussions shall, however, it seems, remain relatively small. In any case, the Prosecutor before the ICC has only limited possibilities as to what to offer in an agreement for the sentencing lies exclusively in the hands of the chamber.[913] The prosecutor can only offer the reduction or alteration of charges or parts of the charges or give the promise to ask for a lower sentence[914] in return for, for example, admitting guilt, conceding certain facts or foregoing an appeal.

In national contexts, "plea bargaining" is widely used in common law countries that employ the adversarial system. Though it is far less common, there is a trend toward its increasing use (for less serious crimes) in a number of civil law countries that employ the inquisitorial system whereby victims rarely participate in plea bargaining because the negotiations typically do not rely on their involvement. [915] From the structure of the procedure before the ICC it seems, that this practice will not be adopted which has to be appreciated.

The Rome Statute does not provide for a veto right of victims over the plea bargain, there is no direct way for victims to influence it.[916] However, Art. 65(4) and Rule 69 establish

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[912] See Rule 62ter ICTY Rules adopted on 13 December 2001.

[913] See Arts. 77, 78.

[914] See also **Guariglia**, **F.** (1999). Art. 65, Proceedings on an admission of guilt. Commentary on the Rome Statute of the International Criminal Court. Observers' Notes, Article by Article. O. Triffterer. Baden Baden, Nomos Verlagsgesellschaft**:** 823-831. At page 831.

[915] See **Elias**, **R.** (1986). The Politics of Victimization. Victims, Victimology and Human Rights. Oxford, Oxford University Press. Pp 150 et seq.

[916] See also **Aldana-Pindell**, **R.** (2004). "An Emerging Universality of the Justiciable Victims' Rights to the Criminal Process to Curtail Impunity for State-Sponsored Crimes." Human Rights Quarterly **26**: 605-686. At page 661. Muttukumaru, C. (1999). Reparations to Victims: Key issues facing the Delegations. Collection of Essays on the Rome Statute of the International Criminal Court. F. S. Lattanzi, William A. William A, Sirente, Ripa die Fagnano Alto, (1999): pp. 262 et seq.

that the Trial Chamber may decide to reject the admission of guilt if "a more complete presentation of the facts of the case is required in the interests of justice, in particular the interests of victims." It is remarkable that the interests of victims are mentioned explicitly. It has even been stated that Art. 65(4) is one of the most important improvements for victims.[917]

The Trial Chamber may then either "[r]equest that the Prosecutor present additional evidence, including the testimony of witnesses"; or "order that the trial be continued under the ordinary trial procedures".

The Chamber may also seek the views of victims or their legal representatives according to Rule 93 when deciding on the question whether to continue the trial under ordinary trial procedures.

In summary, one may say that even if victims do not have a direct influence on the question of plea agreements, it seems that their rights, e.g. to continue proceedings for different reasons, will be preserved, but ultimately of course this remains in the hands of the Court.

It has been said that plea bargains not only save time, money and resources but that in addition victims may be more comforted by a guilty plea than if the defendant had been found guilty by the court because remorse, recognition and reconciliation play a major role in the plea bargaining process.[918]

However, on the other hand victims should not be kept from speaking about the "truth" in a public procedure[919], there may be some value for the victim in the "celebration" of the

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[917] See **Garkawe**, **S.** (2001). "The Victim-related provisions of the Statute of the International Criminal Court: A victimological analysis." International Review of Victimology **8**: 269-289. at page 279; similarly **Scomparin**, **L.** (2005). Il ruolo della vittima nella giurisdizione penale internazionale: alla ricerca di una possibile mediazione fra modelli processuali. Problemi Attuali Della Giustizia Penale Internazionale. A. Cassese, M. Chiavario and G. De Francesco. Torino, Giappichelli Editore**:** 365-398. At page 373.

[918] See **Williams**, **P.** and **B. McGonigle** (2005). Experts Debate the Issues Should the IST engage in plea bargaining? http://law.case.edu/saddamtrial/entry.asp?entry_id=19

[919] See **Ambos**, **K.** (2006). Internationales Strafrecht. München, C. H. Beck Verlag. At page 273.

process which could lead to secondary traumatisation if it is not conducted.[920] Sentencing may not take into account the rights and interests of victims fully [921], especially as long as there is no guarantee that a hearing will take place in the sentencing procedure.[922]

If victims really prefer a plea bargain they can still say so, most probably such an interest will be considered.

VIII. Notification

It is important for victims to be fully informed to ensure successful participation.

Rule 16(1)(a) entrusts the Registrar with the responsibility to provide notice or notification to victims or their legal representative. Rule 16 in para. 2 does not state precisely about which rights victims are to be informed, it simply states, that they are to be informed of "their rights" (a) and the relevant decisions of the Court (b), without for instance enumerating or naming the individual rights. This may be an indication therefore that victims are to be informed in a very comprehensive way, a prospect which should be welcomed. On the other hand, such a formulation involves the danger that in practice it will not be possible to comply to such a rule and that it will be interpreted in a way that serves the exigencies of the Court. The Registrar is responsible for notification under Rule 16.[923]

Notification in the Trial Phase is more specifically developed in Rule 92. Rule 92(4) first of all clarifies that notification as provided for in sub-rules 5 and 6 shall only be provided to victims or their legal representatives who may participate in the proceedings in accordance with a ruling of the Chamber pursuant to Rule 89. The intention behind this

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[920] See **Scomparin**, **L.** (2005). Il ruolo della vittima nella giurisdizione penale internazionale: alla ricerca di una possibile mediazione fra modelli processuali. Problemi Attuali Della Giustizia Penale Internazionale. A. Cassese, M. Chiavario and G. De Francesco. Torino, Giappichelli Editore**:** 365-398. At page 373.

[921] **Muttukumaru**, **C.** (1999). Reparations to Victims: Key issues facing the Delegations. Collection of Essays on the Rome Statute of the International Criminal Court. F. S. Lattanzi, William A.

[922] See below chapter on the sentencing procedure.

[923] See Rule 16(2)(a).

principle is to limit the Court's obligation to give notifications, which might be both burdensome and costly, to those who really need them as participants in the proceedings. Victims who have not applied to participate so far and have not communicated with the Court are not mentioned in Rule 92. Such a limitation is acceptable presuming that victims have enough information to participate because of effective outreach work and the more comprehensive notification demands in the investigation and pre-trial phase.

Rule 92(5) lists the type of information to be notified to the victims, which shall be done in "a timely manner".[924] Sub-Rule 6 states that where victims or their legal representatives have participated in the proceedings, they shall be notified "as soon as possible" of the decisions of the Court in those proceedings.

What exactly is meant by the terms "in a timely manner" or "as soon as possible" will have to be determined by the Court according to the circumstances of the case. In any case there is no fixed point in time included in the Rules or any remedy if notification is not given "in a timely manner" or "as soon as possible".

In Sub-rule 6 the scope of notification seems to be limited to a certain stage of the proceedings, although the formulation is not entirely clear.[925]

Rule 92(7) regulates certain practical aspects of the notification referred to in sub-rules 5 and 6 *inter alia* that the notification shall be in written form. It also clarifies that the Registrar may seek the cooperation of States in respect of notifications. The details of notification are further elaborated on in the Regulations.[926]

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[924] The Rule explicitly mentions that victims have to be notified of a) Proceedings before the Court, including the Date of the hearings and any postponement thereof, and the date of delivery of the decision and b) Requests , submissions, motions and other documents relating to such requests, submissions or motions. Sub-rule 6 prescribes that decisions shall be notified to victims or their legal representatives who have participated in the proceedings leading up to the decision.

[925] See **Bitti**, **G.** and **H. Friman** (2001). Participation of Victims in the Proceedings. The International Criminal Court, Elements of Crimes and Rules of Procedure and Evidence. R. S. Lee. Ardsley, New York, Transnational Publishers**:** 456-474. At page 470.

[926] See Rule 31 on notification.

The Statute and Rules do not provide for any legal remedies for victims if they are not notified or not adequately notified.

Besides notifications directed specifically to victims and their legal representatives, various other kinds of information must also be made available to them pursuant to other rules. Subject to restrictions concerning confidentiality and the protection of national security, the record of the proceedings may be consulted. Additionally, the Court is obliged to "make public" certain information such as the trial date as well as the judgements and most other decisions. Certainly the Court may make much more information available to the public – press releases, Internet home pages, etc. – and also issue information directed, for example, to affected communities. Information of this kind is not covered, or precluded, by Rule 92, since it is not intended primarily for the participation in the proceedings and can thus be much less formal without any need for regulation.[927]

According to Rule 142 the Trial Chambers must inform all those who participated in the proceedings of the date on which the Trial Chamber will hand down its decision.

In conclusion, it should be noted that in comparison with notification before the ICTs, the ICC has many more and more detailed rules on notification. Even though the notification rules include various restrictions, they still give the victim adequate notification to assure a fair and sufficient level of participation.

As there are no judicial remedies to enforce proper notification, it is up to the ICC to deal responsibly with the matter. Notification is an essential part of the procedural framework for meaningful victim participation. Attention should therefore be directed to the way in which the ICC ultimately carries out notification. There may be a temptation for the ICC not to inform victims as extensively as would be desirable, especially when proceedings become more and more complex and the number of participating victims rises.

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[927] See **Bitti**, **G.** and **G. González Rivas** (2006). The Reparations Provisions for Victims Under the Rome Statute of the International Criminal Court. Redressing Injustice through Mass Claims Processes: Innovative Solutions to Unique Challenges. Oxford**:** 299-322. At page 309.

IX. Distinguishing between victims and witnesses

There are several differences between participating as a victim and appearing before the Court as a witness. The most striking differences are probably, that participation is voluntary whereas witnesses are called by the Defence, Prosecution or the Chamber. Victim participation further serves to communicate the interests of victims themselves while witnesses have to serve the interests of the Court and the party that calls them.[928]

A controversial point is whether victims participating in the process may also appear as witnesses at the same time or later on in the proceedings. In the absence of a specific provision in Statute and Rules, it remains undecided whether victims are precluded from testifying as witnesses at a later point.

As a general rule, there can be no doubt that the victim is qualified to testify as a witness and must make the declaration under Rule 66(1). However, it has been held that in order to safeguard the rights of the accused fully, it will be necessary to ensure that a victim may not simultaneously be a witness and a party simultaneously in the same case.[929]

Some have also suggested that the granting of a well-defined procedural status for victims, coupled with their award of a direct interest in obtaining restitution and compensation, may lessen the credibility of victims as witnesses.[930]

As stated above, if victims that have participated are to testify later on, a solution must be found for cases where victims through victim participation may gain access to records whose contents may affect their testimony.[931] Furthermore, if the victim has already heard most of the evidence in the case, then it is clear that the credibility of his or her testimony will be reduced.

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[928] For more differences see Victim booklet at page 13.

[929] **Jorda**, **C.** and **J. de Hemptienne** (2002). The Status and Role of the Victim. The Rome Statute of the International Criminal Court, A Commentary. A. Cassese, P. Gaeta and J. R. W. D. Jones. Oxford, Oxford University Press. **2:** 1387-1419. At page 1409.

[930] **Zappalà**, **S.** (2003). Human Rights in International Criminal Proceedings. Oxford, Oxford University Press. At Page 222.

[931] Thereto see above pages 184 et seq.

On the other hand, it has been argued that victim participation pursuant to Rule 89 *et seq* does not reach such a level of involvement that the issue of incompatibility could arise.[932] Furthermore it has been pointed out that such an exclusion could present a difficult choice to victims because they could lose their right to obtain reparation if they appear as witness. Moreover, the victim would often be a direct, maybe even a decisive witness, so that excluding victims could prevent the establishing of the truth. Finally if one presumes that a victim cannot be an objective witness, the problem would remain up to a certain extent, even if the victim did not participate because still it would be known that the witness was a victim.[933] It has also been said that the heading of Art. 68 "Protection of the victims and witnesses and their participation in the proceedings" indicated that it was not intended to have a separation between participation as victim or alternatively as witness before the ICC. From Rule 140(3)[934] it could be deduced that the Chamber could allow victims to be present in the proceedings even if they were to be heard as witnesses afterwards.[935] The separation into "victims" and "victim-witnesses" has also been said to be artificial.[936]

As noted above the Statute and Rules do not give any indication either way. In opposition to the Defence, in one case before the ICC the Prosecutor[937] stated that the fact that

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[932] **Kreß**, **C.** (2001). Witnesses in the Proceedings Before the International Criminal Court: An Analysis in the Light of Comparative Criminal Procedure. International and National Prosecution of Crimes Under International Law. H. Fischer, C. Kreß and S. R. Lüder. Berlin, Berlin Verlag. At page 318; **Stehle**, **S.** (2006). Das Strafverfahren als immaterielle Wiedergutmachung. Frankfurt am Main. At Page 287.

[933] **David**, **E.** (2005). "La participation des victimes au procès devant la Cour pénale internationale." Recueil des cours de l'Académie de droit international **313**: 325 et seq. Para.9.

[934] Which determines that a witness who has heard the testimony of another witness shall not for that reason alone be disqualified from testifying. When a witness testifies after hearing the testimonies of others, this fact shall be noted in the record and considered by the Trial Chamber when evaluating the evidence.

[935] **Stehle**, **S.** (2006). Das Strafverfahren als immaterielle Wiedergutmachung. Frankfurt am Main. Pp 286 et seq.

[936] **La Rosa**, **A.-M.** (2003). Juridictions pénales internationales. Paris, Presses Universitaires de France. At page 376.

[937] See Defence, Situation in the Democratic Republic of the Congo **Prosecutor vs. Thomas Lubanga Dyilo,** Request for leave to appeal the "Décision sur les demandes de participation à la procedure a/0001/06, a/0002/06, et a/0003/06 dans le cadre de l'affaire Le Procureur vs. Thomas Lubanga Dyilo et de l'enquête en République démocratique du Congo of 7 August 2006, Case No ICC-01/04-01/06-272, see also **Walleyn**, **L.** (2002). "Victimes et temoins de crimes internationaux: du droit a une protection au

certain victims were already witnesses of the Prosecution was not an issue even if they were admitted as participating victims - they had dual status as victim-participants and witnesses. The OTP justified its point of view by stating that since the Statute and Rules of the ICC do not address the issue of individuals having both witness and victim status throughout the proceedings, such dual status could not be excluded. For instance, Art. 68 of the Statute, provided few tools indicating how participation should be effected, but did not prohibit an individual from having the dual role of victim and witness.

The Prosecution also submitted that preventing or restricting victims from testifying later on would also artificially constrain the Prosecution's broad powers to establish the truth under the Statute and Rules. The Prosecutor has wide powers to establish the truth and under Art. 54(3) also broad powers to collect evidence.

It was further pointed out that the Victims Declaration did not suggest that having victim status was considered incompatible with also having witness status and European institutions did not see a contradiction between participating as a victim and also being relied upon or asked to testify either. The Prosecutor further named a number of national jurisdictions where such a dual position was also permitted.

In the alternative, the Prosecution argued that if the Pre-Trial Chamber was of the view that the victim status of the Applicants was incompatible with their ability to serve as Prosecution witnesses, it respectfully requested that the Applicants participated in the proceedings as victims after having testified at trial in support of the Prosecution case.

The question is handled differently in various national jurisdiction[938] and an analysis of their practices yields no distinct solution or clearly identifiable legal practice.

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droit a la parole." Revue Internationale de la Croix-Rouge **84**(845): 51-78. http://www.icrc.org/Web/Fre/sitefre0.nsf/htmlall/5FZJE8/$File/irrc_845_001_Walleyn.pdf.

[938] In some national systems the victim cannot testify as a witness, though, where he or she, for all practical purposes, assumes the procedural role of the Prosecution. In Germany, it is the predominant view (see Kleinknecht and Meyer-Goßner, before § 374, margin n. 5 et seq.) that the "Privatkläger" (replacing the State prosecutor) in proceedings pursuant to § 374 et seq. of the German Code of Criminal Procedure cannot testify as a witness (for a different approach see Art. 172 of the Austrian Criminal Code of Procedure); if, however, the victim participates as "Nebenkläger" (i.e., alongside the State prosecutor) he or she is qualified to testify as a victim. Unter Portuguese laws, however, the "assistente", who as the German Nebenkläger acts alongside and in support of the State prosecutor (Art. 69 (1)) CPP), is

Analysed from first principles the better arguments seem to speak in favour of not excluding victims from testifying at a later stage: As concerns the reasoning of Jorda, it should be considered that in his reasoning the model of the French "*partie civile*" lends support to his argument.[939] The similarities of the French "*partie-civile*"-system and victim participation before the ICC is, however, limited. Even if victims before the ICC have numerous rights, his or her participation does not approach the level of the participation of that of a real party to the proceedings. In particular victims before the ICC may not invoke the principle of equality of arms like the *partie civile* in France.[940] However, the absence of comprehensive rights, such as a right to access the records, distinguishes the case of victims before the ICC from those in the French system. The situation before the ICC is, as already said, not comparable.

It is also true that it would be extremely difficult for victims to choose between participating as victims and testifying as witnesses. Victims may wish to take the chance of speaking personally as a witness even if they risk being cross-examined instead of simply being able to speak freely, especially if they will probably participate through their legal representative. It is also important to remember that testifying as a witness is – at

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disqualified from testifying as a witness (Art. 133 (1) (b) CPP).]
In Argentina the Code of Criminal Proceedings of the Province of Buenos Aires (ACPP) provides that the victim has the right to participate in criminal proceedings both as "civil actor" and as "affected person" (particular dammnificado). In both cases, this condition does not preclude the victims from fulfilling their obligation to testify: See Arts. 67 and 80 ACPP.
In Spain, for instance, a victim may, *inter alia*, take part in criminal proceedings as a "private prosecutor" but nonetheless remains subject to the obligation of testifying as a witness, Arts. 410 and 416 of the "Ley de enjuiciamiento criminal.
In the French system, once an individual has acquired the status of victim (partie civile) he or she cannot testify at trial under oath. In the Brazilian and Portuguese systems the victim is entitled to be heard, present facts and substantiate the evidence. However, these systems also draw a distinction between the status of the victim (ofendido) and that of the witness (testemunha). To avoid an apparent conflict of interest, the Brazilian and Portuguese systems rest on the principle that a "victiminterested party" provides "information" on the stand without a solemn undertaking. See Brazilian Código de Processo Penal (BCPP), Art. 271 and Portuguese Código de Processo Penal (PCPP), Arts.69, 339(2) and 341. BCCP, Arts. 201-203 and PCPP, Arts.145(4) and 346-348.

[939] See **Jorda**, **C.** and **J. de Hemptienne** (2002). The Status and Role of the Victim. The Rome Statute of the International Criminal Court, A Commentary. A. Cassese, P. Gaeta and J. R. W. D. Jones. Oxford, Oxford University Press. **2:** 1387-1419. at page 1409, footnote 105 referring to the jurisprudence of the French *Cour de cassation*. It should also be remarked that in the text Jorda/de Hemptienne say that a victim may not simultaneously be a witness and a party (emphasis added) while in the ICC proceedings the victim does not have the status of a party.

[940] See **David**, **E.** (2005). "La participation des victimes au procès devant la Cour pénale internationale." Recueil des cours de l'Académie de droit international **313**: 325 et seq. Para. 12.

least theoretically - not voluntary[941] and that if victims are already assigned the status of witness at an early stage of the proceedings, they are then deprived of their right to participate.

With regard to the argument that testifying as a witness could preclude victims from receiving reparations later on, in the opinion of the author it is not evident that this would be the case even if victims who have participated in the proceedings may testify later on. This does not necessarily mean conversely that witnesses may not receive reparations later on. Of course it is possible that victims could arrange between themselves to produce a falsified version of the "truth" with the intention of receiving reparations later on. However, in different situations there may be a certain danger that witnesses may pursue their own interests therefore the Statute creates an offence of giving false testimony.[942] Furthermore, having given false testimony could act as a criterion to exclude victims from the reparation procedure.[943] The judges must establish the truth but it seems unfair to preclude all victims who participated as witnesses from the reparation procedure only because some could exploit the procedure to give testimony in their own interests. Moreover, it does not have to be expected that reparations will be any more than symbolic[944] thus not giving much incentive for false testimony. Of course, victims may all the same have the expectation that they will receive monetary compensation.

Another argument which speaks in favour of allowing victims to testify later on is that the Chamber has wide discretion as to the extent of victim participation and can therefore limit victim participation by, for example, precluding the presence of the victim when

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[941] See Art. 64(6)(b), on this topic see also **Kreß**, **C.** (2001). Witnesses in the Proceedings Before the International Criminal Court: An Analysis in the Light of Comparative Criminal Procedure. International and National Prosecution of Crimes Under International Law. H. Fischer, C. Kreß and S. R. Lüder. Berlin, Berlin Verlag. Pp 323 et seq; see also **Ingadottir**, **T.**, **F. Ngendahayo**, et al. (2000). The International Criminal Court. The Witness and Victims Unit (Article 43.6. of the Rome Statute) A Discussion Paper. ICC Discussion Papers. PICT, Ingadottir, Thordis Romano, Cesare P.R. **1**. At page 6.

[942] See Art. 70 Statute.

[943] See **Dwertmann, Eva,** The Reparations System of the International Criminal Court, its implementiation, possibilities and limitations, forthcoming.

[944] See **Dwertmann, Eva,** The Reparations System of the International Criminal Court, its implementiation, possibilities and limitations, forthcoming.

another witness is testifying or may confine the victim's intervention to written observations or submissions. This may not be desirable but is still a possibility. Another possibility is that the Chamber can order a witness to give testimony which shall be recorded before the victim hears other testimony.[945]

Of course, if a victim has already heard all the evidence before later testifying as a witness, the Chamber may not accord much or any weight to the testimony at all. The Chamber could inform victims beforehand of this fact or the victim's legal representative may dissuade victims from being present in the proceedings before testifying.

From a practical and pragmatic point of view it must be added that most witnesses were victims before the ICTY [946] and it seems this could also be the case before the ICC. As it is not always easy to reach the relevant witnesses[947], the Prosecution might be dependent on "attracting" witnesses by means of victim participation. The Court may also depend on victims that have already participated in the proceedings for its functioning and credibility. This of course could also pose a danger insofar as the voluntariness of victim participation could be seriously challenged if victims are automatically called to testify afterwards. This could consequently deter victims from participating. However, this issue cannot be resolved by preventing victims from testifying thus imposing a disadvantage on them, but the ICC will have to be responsible in this regard. Of course, practical arguments should not prevail but it cannot be forgotten that the ICC's limited resources will mean that a certain amount of importance will often be attached to such questions.

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[945] See Art. 69(2).

[946] See Ninth Annual Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, A/57/150 of 4 August 2002, http://www.un.org/icty/rappannu-e/2002/index.htm, at para. 268.

[947] Even if witnesses in principle are obliged to testify before the Court, see Art. 64 (6) (b), but in reality the ICC is not empowered to request a State party to compel a witness before the Court which in the end rather leads to "voluntary appearance", see **Kreß**, **C.** (2001). Witnesses in the Proceedings Before the International Criminal Court: An Analysis in the Light of Comparative Criminal Procedure. International and National Prosecution of Crimes Under International Law. H. Fischer, C. Kreß and S. R. Lüder. Berlin, Berlin Verlag. Pp 323 et seq.

Altogether it seems reasonable not to exclude victims from later testifying as witnesses even if the fact that they have participated beforehand may have some influence on their credibility as may have the fact alone that they are victims. This will have to be taken into account by the judges.

The final issue in this context relates to the possible interaction between victim participation and witness testimony. It is important to remember that victim participation and witness testimony may share similar functions. Many of the reasons that have been advanced in support of victim participation reasonate with the justifications put forward for victim-witness testimony, these include the need to establish the truth and to provide an opportunity for individuals and their societies to begin a process of healing and reconciliation.[948]

The Rome Statute does not clarify the exact relationship between participating victims and victim-witnesses. The Court will only have a certain amount of time to hear victims and witnesses. There is therefore a risk that if victims have already participated in the proceedings they will be accorded even less space and time when testifying than they already were for instance before the ICTs.[949] However, victim participation and testifying as a witness are quire different matters in their format and what they can achieve even if they do share some similar goals.

Before the ICC, it seems that the debate over the the issue of the dual status of victim-witness has by now been virtually closed as far as the Court's current jurisprudence is concerned, notably through the appeal decision of 11 July 2008 in the Lubanga case.[950]

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[948] See **Haslam**, **E.** (2004). Victim Participation at the International Criminal Court: A Triumph of Hope over Experience? The Permanent International Criminal Court. Legal and Policy Issues. D. McGoldrick, P. Rowe and E. Donnelly. Oxford and Portland Oregon, Hart Publishing**:** 315-334. At page 327.

[949] See referring to this Ibid. at page 334 who fears that instrumentalisation of victim-witnesses will remain and even grow.

[950] See Appeals Chamber, Situation in the Democratic Republic of the Congo in **Prosecutor v. Thomas Lubanga Dyilo**, Judgment on the appeals of The Prosecutor and The Defence against Trial Chamber I's Decision on Victims' Participation of 18 January 2008 of 11 July 2008, Case No. ICC-01/04-01/06 OA 9 OA 10, paras. 18 et seq.

X. Participation in the sentencing proceedings

According to Art. 76 (2)[951] the Trial Chamber may on its own motion and shall, at the request of the Prosecutor or the accused, hold a further hearing to hear any additional evidence or submissions relevant to the sentence, in accordance with the Rules of Procedure and Evidence except where Art. 65 applies and before the completion of the trial. The victim has no influence upon whether such a hearing will take place.

However, if such a hearing takes place, victims again have the opportunity to present their views and concerns. It is questionable whether any views and concerns will be heard[952], but at least representations under Art. 75 can be made and must be heard.[953] The fact that there is explicit mentioning of views concerning reparations indicates that only such views shall be heard. The idea behind this is probably that different views and concerns may have been presented during the trial and are not to be repeated.

However, the ICC may also decide to follow the practice of the *ad hoc* Tribunals in considering victim impact statements presented by the Prosecutor in reaching decisions on sentence.[954] As already stated, victims will probably not be allowed to make a statement to apply for or propose a certain sentence.[955] Still, giving victims the possibility to speak about their suffering[956] is an important measure as the satisfaction that a victim

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[951] As for the date of the hearing see Rule 143

[952] See for instance **Beigbeder**, **Y.** (2002). Judging Criminal Leaders The slow erosion of impunity. The Hague/Londond/New York, Martinus Nijhoff Publishers. At page 132 who deems Art. 68 applicable to the trial sentencing.

[953] See Art. 76 (3), see also **Aldana-Pindell**, **R.** (2004). "An Emerging Universality of the Justiciable Victims' Rights to the Criminal Process to Curtail Impunity for State-Sponsored Crimes." Human Rights Quarterly **26**: 605-686. At page 662.

[954] **McDonald**, **A.** (2002). The Role of Victims and Witnesses in International Criminal Trials. Treaty Enforcement and International Cooperation in Criminal Matters with special reference to the Chemical Weapons Convention. R. Yepes-Enriques and L. Tabassi. The Hague, T.M.C. Asser Press**:** 257-276. pp 272 et seq.

[955] See above Chapter on closing statements.

[956] Which, very importantly, will indeed been taken into account, see Rule 145 RPE which determineds that: *1. In its determination of the sentence pursuant to article 78, paragraph 1, the Court shall:*

may gain by his or her assailant's prosecution and punishment may be outweighed or diminished by the strong sense of injustice caused by what the victim perceives as an inadequate or unfair sentence.

It has also been stated that in view of the specific circumstances of massive and collective violence, retributive sentiments of victims and their relatives cannot be completely disregarded. Such considerations were, however, a balancing act, as they may hamper reconciliation and impede efforts to respect rights of the accused or convicted person to individualized, fair an proportional punishment.[957]

Even if studies in national law about victim impact statements indicate that such statements have little or no effect on sentencing, still it was established that they seem to contribute significantly to victim satisfaction in the resolution of the cases.[958]

(a) bear in mind that the totality of any sentence of imprisonment and fine, as the case may be, imposed under article 77 must reflect the culpability of the convicted person; (b) Balance all the relevant factors, including any mitigating and aggravating factors and consider the circumstances both of the convicted person and of the crime; (c) In addition to the factors mentioned in article 78, paragraph 1, give consideration, inter alia, to the extent of the damage caused, in particular the harm caused to the victims and their families, the nature of the unlawful behaviour and the means employed to execute the crime, the degree of participation of the convicted person; the degree of intent; the circumstances of manner, time and location; and the age, education, social and economic condition of the convicted person.

2. In addition to the factors mentioned above, the Court shall take into account, as appropriate: (a) Mitigating circumstances such as: (i) The circumstances falling short of constituting grounds for exclusion of criminal responsibility, such as substantially diminished mental capacity or duress; (ii) The convicted person's conduct after the act, including any efforts by the person to compensate the victims and any cooperation with the Court; (b) As aggravating circumstances: (i) Any relevant prior criminal convictions for crimes under the jurisdiction of the Court or of a similar nature; (ii) Abuse of power or official capacity; (iii) Commission of the crime where the victim is particularly defenceless; (iv) Commission of the crime with particular cruelty or where there were multiple victims; (v) commission of the crime for any motive involving discrimination on any of the grounds referred to in article 21, paragraph 3; (vi) Other circumstances which, although not enumerated above, by virtue of their nature are similar to those mentioned. 3. Life imprisonment may be imposed when justified by the extreme gravity of the crime and the individual circumstances of the convicted person, as evidenced by the existence of one or more aggravating circumstances.

[957] See **Rauschenbach, Mina; Scalia, Damien** . "Victims and international criminal justice: a vexed question? " International Review of the Red Cross **90** (870) (2008): pp. 441-459. At page 436; see also **Schabas, William A.**, "Sentencing by international tribunals: a human rights approach", Duke Journal of Comparative and International Law **2**(1) (1997): pp.461-517. At page 502.

[958] **O'Hara**, **E. A.** (2005). "Victim participation in the criminal process." Journal of Law and Policy **3**: 229-347. At page 241.

It is thus very much to the victim's advantage and in the interests of justice and reconciliation, that, under the Statute, he or she may have the opportunity to be heard during the sentencing phase of ICC proceedings.

In the European jurisprudence, there is also widespread debate on the degree of victim participation in sentencing.[959]

Even if the Trial Chamber does not hold a sentencing hearing, it must consider the particular harm caused to the victim and their families, as well as aggravating factors such as if the victim was particularly defenceless or if there were multiple victims.

XI. Participation in the Reparations Procedure

Neither the Statute nor the RPE state expressly whether the reparations procedure is distinct or not from the sentencing procedure. Reading Art. 76(3) in combination with Art. 75 allows one to suppose that the reparation proceedings could take place during the sentencing procedure.

The reparations proceedings will only take place once the accused person's guilt has been established. It has therefore been suggested that the reparation proceedings should be separate and there have been proposals to conduct reparation proceedings only after conclusion of trial proceedings.[960]

Art. 75 (1) deals with the final stage of proceedings and the possibility of requesting the Court to determine the scope and extent of any damage, loss and injury to, or in respect of victims, that is, to make reparation orders without specifying who may request this

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[959] See e.g. **Edwards** 'Victim participation in sentencing' (2001) 40(1) How LJ 39; A Ashworth 'Victim Impact Statements and Sentencing' (1993) CrimLR 498; and **A. Sanders** 'Victim Impact statements: don't work, can't work' (2001) CrimLR 447.

[960] See **David**, **E.** (2005). "La participation des victimes au procès devant la Cour pénale internationale." Recueil des cours de l'Académie de droit international **313**: 325 et seq. Paras. 14 et seq.; see also **Henzelin**, **M.**, **V. Heiskanen**, et al. (2006). "Reparations to Victims before the International Criminal Court: Lessons from International Mass Claims Processes." Criminal Law Forum **17**: 317-344. Pages 329, 330.

determination. One may deduce from this that victims have the right to make such a request.[961] The Chamber may also determine the scope and extent on its own motion.[962]

Victims have a right to participate in these reparation hearings.[963] Art. 75(3) stipulates that before making a reparation order, the Court may invite and shall take account of representations from or on behalf of the offender, victims, and other interested persons, the Court may take into account the needs of the victim and others who might be affected by the award, such as the offender's family. [964]

One may question whether the right to make representations is reserved to those victims that have been invited by the Court. The wording of Art. 75 paragraph 3 is obtuse[965], and yet there is indication that representations may also be made by victims who have not been invited. First, Art. 75(3) stipulates that the Court may invite and shall take account of representations. The provision is therefore not clearly limited to representations by invited persons. Second, if only those victims that are invited were to make representations, the notification provisions[966] would be superfluous. Third, the invitation is only an option the Court may take[967] or may as well not take. Considering the importance that this part of the proceedings has for the victims, one may assume that victims are not dependent on this uncertain option. Finally, in comparison with Rule 93, it is clear that inviting victims is to be seen as a supplementary option, that does not prevent victims from participating on their own initiative.

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[961] See also **Heikkilä**, **M.** (2004). International criminal tribunals and victims of crimes. Turku, Institute for Human Rights, Abo Akademi University. At page 146.

[962] See Art. 75(1).

[963] See Art. 75(3).

[964] See also **Bassiouni**, **M. C.** (2005). The Legislative History of the International Criminal Court: Introduction, Analsysis and Integrated Texts. Ardsley, New York, Transnational Publishers.

[965] See **Zappalà**, **S.** (2003). Human Rights in International Criminal Proceedings. Oxford, Oxford University Press. At page 229.

[966] See Rule 96, Rule 97.

[967] Which is indicated by the word "may" in Art. 75 (3).

To make victims aware of their right to request reparations and of existing reparation procedures, Rule 16 obliges the Registrar to inform the victims of their rights under the Statute and the Rules, and Rule 96 requires the Registrar to notify the victims or their legal representatives, insofar as practicable, of the proceedings and to adopt all necessary measures to give adequate publicity of the reparation proceedings before the court, to the extent possible, to other victims, interested persons and interested states.

Rule 97(2) provides that at the request of victims or their legal representatives, or at the request of the convicted person, or on its own motion, the Court may appoint appropriate experts to assist it in determining the scope, extent of any damage, loss and injury to or in respect of victims, and to suggest various options concerning the appropriate types and modalities of reparations. The Court shall invite victims or their legal representatives, as appropriate, to make observations on the reports of the experts.

Rule 99, on the other hand, provides that victims or their legal representatives, who have made a request for reparations or who have given a written undertaking to do so, may request the Pre-Trial Chamber or the Trial Chamber to seek the cooperation of states to take protective measures for the purpose of forfeiture.

Finally, Art. 82(4) establishes that a legal representative of the victims, the convicted person or a *bona fide* owner of property adversely affected by an order of reparations may appeal against the order, as provided for in the Rules.[968] It seems from the wording of the Article that this right to appeal is reserved to the legal representative and cannot be exercised by the victim him or herself.[969]

Another possibility to participate in the reparation procedure could be provided by Art. 68(3). First of all, Art. 75 forms part of Part 6 of the Statute "The Trial" and the reparations proceedings are considered part of the trial stage.[970] It is therefore not difficult

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[968] See also Rule 153.

[969] See also **David**, **E.** (2005). "La participation des victimes au procès devant la Cour pénale internationale." Recueil des cours de l'Académie de droit international **313**: 325 et seq. Para. 4.

[970] See booklet for the participation of victims in the proceedings, p.11. Check and refer to Decision on Victims Participation in Pre-Trial Proceedings, PTC I, 17 Jan 2006, precise analysis of the term "proceedings"

to show how Art. 68(3) is applicable. It has been stated correspondingly that "appropriate stages of proceedings" in the sense of Art. 68 encompass, among others, the ward of reparations. [971]

Art. 75(3) could, however, be seen as *lex specialis* prevailing over the general right in Article 68 (3).[972] This interpretation is, however, ruled out by Rule 91(4) which not only indicates that Art. 68 as Rules 89 et seq. are applicable, but also shows that victims have much more far-reaching rights for the reparation proceedings than for the trial proceedings.[973] This is understandable when one considers that after conviction, the rights of the accused cannot be infringed as easily anymore and that the reparation proceedings are of great significance to the victims.

Therefore Art. 75(3) and the respective rules have to be understood as adding supplemental options but not as excluding the applicability of Art. 68(3).

Victims must fulfil the conditions laid down in Art. 68(3) if this rule is applied.[974] It may be the case that victims who have already participated in the trial proceedings will automatically be allowed to participate in the reparation proceedings. However, it is important to note that the Court provides separate application forms.[975] The Court may therefore require a separate application with a clearly demonstrated personal interest in this part of the proceedings. If this is the case, it can be assumed that victims will be informed of this fact.

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[971] **Beigbeder**, **Y.** (2002). Judging Criminal Leaders. The slow erosion of impunity. The Hague/Londond/New York, Martinus Nijhoff Publishers. At page 132

[972] See for example **Heikkilä**, **M.** (2004). International criminal tribunals and victims of crimes. Turku, Institute for Human Rights, Abo Akademi University.at page 144; see also **Mekjian**, **G. J.** and **M. C. Varughese** (2005). "Hearing the victim's voice: analysis of victims' advocate participation in the trial proceeding of the International Criminal Court." Pace International Law Review **17**: 1-46. At page 16.

[973] Rule 91 (4) gives the victims' legal representative the right to question witnesses, experts and the convicted person without further confining this right as provided for in the trial proceedings, see above; as already said, in Art. 82 (4) are also given a right to appeal which they are not given in the course of the trial proceedings.

[974] See above chapter participation in the Trial.

[975] See on the official website of the ICC.

Finally, victims or their legal representatives have a right to attend the pronunciation of the decision on reparations by the Trial Chamber.[976]

When reparations are awarded through the Trust Fund, the Trust Fund Regulations determine the modalities of victims' involvement in shaping and implementing reparation awards. Where the Court has not determined the beneficiaries of individual awards in developing options of determination of beneficiaries and processing of claims, the Trust Fund's Secretariat may consult, among others, victims or their legal representatives and families of individual victims.[977] In determining the nature and implementation of collective awards, the Board of Directors may also consult the mentioned persons.[978]

E. Appeal

The Prosecutor and the convicted person have a right to appeal against an acquittal or conviction or against the sentence under Art. 81 but not the victim.[979]

The only explicit right of victims to appeal is provided for in Art. 82(4) which permits victims to appeal against the order of reparations.[980]

Still, victims could participate in the appeals proceedings according to Art. 68(3) if this article is applicable to the appeals proceedings.

As already stated, according to Rule 149, Parts 5 and 6 of the Statute and the Rules governing proceedings and the submission of evidence in the Pre-Trial and Trial shall be

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[976] Rule 144. The Rule only refers expressly to victims and their legal representatives "participating in the proceedings pursuant to Rules 89 to 91".

[977] Reg. 61 Trust Fund Reg.

[978] Reg. 70 Trust Fund Reg.

[979] See Art. 81(1)(a) and (b).

[980] See also **McDonald**, **A.** (2002). The Role of Victims and Witnesses in International Criminal Trials. Treaty Enforcement and International Cooperation in Criminal Matters with special reference to the Chemical Weapons Convention. R. Yepes-Enriques and L. Tabassi. The Hague, T.M.C. Asser Press**:** 257-276.Pp 272 et seq.

applied *mutatis mutandis* to proceedings in the Appeals Chamber. Thus it seems that Art. 68(3)[981] shall apply *mutatis mutandis* to the proceedings in the Appeals Chamber.

It has also been argued that the heading of Art. 68 "participation in the proceedings" shows that Art. 68 is open to being applied to the appeals proceedings.[982]

As already stated for Art. 82, which also applies here, another indication that participation in the appeals procedure is possible is the fact that Rule 149 is applicable.

Furthermore, in the application form[983] victims can mark whether they want to participate in the appeals proceedings. Of course, this could be limited to a participation in a procedure according to Art. 82(4) but it can be assumed that the application form would have been more precise on this point if it were intended to create such a limitation.

Of course, Art. 68(3) must be adapted to the appeals procedure. This would mean in particular that the personal interest required would have to be an interest that refers to the appeals stage.

Already in early decisions the ICC Prosecutor[984] and Chamber[985] had acted on the assumption that victim participation in interlocutory appeals was possible, whereby it could already be assumed that they would also allow for participation in the appeal procedure according to Art. 81.

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[981] Being located in Part 6 of the Statute.

[982] **Stehle**, **S.** (2006). Das Strafverfahren als immaterielle Wiedergutmachung. Frankfurt am Main. At page 325; see also **Beigbeder**, **Y.** (2002). Judging Criminal Leaders The slow erosion of impunity. The Hague/Londond/New York, Martinus Nijhoff Publishers. At page 132.

[983] See Part C, page 9.

[984] See Prosecutor, Situation in the Democratic Republic of the Conge in **Prosecutor vs. Thomas Lubanga Dyilo,** Prosecution's Response to Request of Victims to Participate in the Appeal, pursuant to 'Order of the Appeals Chamber' of 4 December 2006 of 6 December 2006, Case No. ICC-01/04-01/06-757, paras. 11 et seq.

[985] See Appeals Chamber, Situation in the Democratic Republic of the Conge in **Prosecutor vs. Thomas Lubanga Dyilo,** Decision of the Appeals Chamber of 12 December 2006, Case No. ICC-01/04-01/06-769, at page 3.

In the *Lubanga* Case the Appeals Chamber has in a judgement of 13 June 2007 dismissed the joint application of victims a/0001/06 to a/0003/06 and a/0105/06 to participate in the determination of the preliminary issue of the admissibility of the appeal against the Decision on the confirmation of charges. The majority found in this decision that the victim applicants' personal interests were not affected by the issue, since the Appeals Chamber's determination would neither result in the termination of the prosecution nor preclude the victims from later seeking compensation, and the victims had not put forward any other basis on which their personal interests were affected.[986]

Still, participation in the appeal seems possible if certain criteria are fulfilled: In a judgement of 16 May 2008 the Appeals Chamber explained that there are four criteria that need to be considered in respect of applications by victims for participation in appeals brought under Art. 82(1) of the Statute, namely:

(i) whether the indivuals seeking participation are victims in the case, (ii) whether they have personal interests which are affected, (iii) whether their participation is appropriate and (iv) that the manner of participation is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.[987]

In other decisions victims where granted the right to participate in the appeal for the purpose of presenting their views and concerns.[988]

Pursuant to Rule 149, Rules 92(5) to 92(8) regarding notification shall apply to the appeals stage.

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[986] See Appeals Chamber, Situation in the Democratic Republic of the Congo in **Prosecutor vs. Thomas Lubanga**, Decision of the Appeals Chamber on the Joint Application of Victims a/001/06 to a/0003/06 and a/0105/06 concerning the "Directions and Decision of the Appeals Chamber" of 2 February 2007 of 13 June 2007, Case No. ICC-o1/o4-01/06 OA 8, paras. 24 et seq.

[987] See Appeals Chamber, Situation in the Democratic Republic of the Congo in **Prosecutor v. Thomas Lubanga Dyilo,** Decision, *in limine*, on Victim participation in the appeals of the Prosecutor and the Defence against Pre Trial Chamber I's decision entitled "Decision on Victims' participation" of 16 may 2008, ICC Case No. ICC-01/04-01/06 OA 9 and OA 10, paras 36 et seq.

[988] See for instance Appeals Chamber, Situation in the Democratic Republic of the Congo in **Prosecutor v. Thomas Lubanga Dyilo,** Decision on the participation of victims in the appeal of 6 August 2008, ICC Case No. ICC-01/04-01/06 OA 12; Appeals Chamber, Situation in Uganda in **Prosecutor vs. Joseph Kony, Vincent Otti, Okot Odhiambo, Dominic Ongwen**, Decision on the participation of victims in the appeal of 27 October 2008, Case No ICC-02/04-01/05 OA 2.

Furthermore, according to Rule 156(2) the Registrar must give notice of an appeal to all who participated in the proceedings before the Chamber that gave the decision that is the subject of the appeal.

F. Revision of conviction

Art. 84 provides for the "revision" of a final judgement of conviction or sentence in certain circumstances where new evidence has subsequently been discovered, or where it has emerged that evidence was false or forged, or that one of the judges trying the case committed serious misconduct in the case.[989]

Revision proceedings can be brought under this paragraph only by the convicted person, or certain others acting on behalf of the convicted person, but not victims.

According to Art. 84(2) the Appeals Chamber may, if it determines that the application is meritorious, reconvene the original Trial Chamber, constitute a new Trial Chamber or retain jurisdiction over the matter, with a view to, after hearing the parties arriving at a determination on whether the judgement should be revised. [990]

It has been held that victims may participate in such proceedings according to Art. 68(3).[991]

It is questionable whether such revision proceedings can still be categorised as "proceedings" in the sense of Art. 68(3).

The aim of the revision procedure is, however, to deal once again with matters that have influenced the decision because they would not have been taken into account at that point

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[989] **Staker**, **C.** (1999). Revision of conviction or sentence. Commentary on The Rome Statute of the International Criminal Court. Observers' Notes, Article by Article. O. Triffterer. Baden Baden, Nomos Verlagsgesellschaft. At page 1037.

[990] **Amnesty International**, Cour Pénal Internationale, Fiche d'information 6, London (2000). At page 2.

[991] **Beigbeder**, **Y.** (2002). Judging Criminal Leaders. The slow erosion of impunity. The Hague/Londond/New York, Martinus Nijhoff Publishers. At page 132.

if it had been clear, that there was for instance false or forged evidence. The proceedings are therefore reopened and may be categorised as "proceedings" in the sense of Art. 68(3). Victims may very well also have a personal interest in participating in such proceedings, as they may result in a different outcome then the original proceedings.

G. Sentence reduction hearing

According to Art. 110(3), when a person has served two thirds of the sentence, or 25 years in the case of life imprisonment, the Court shall review the sentence to determine whether it should be reduced in accordance with the conditions set out in Art. 110(4). Such a review cannot be conducted before that time.

It has been argued that victims should be allowed to participate in sentence reduction hearings.[992]

It should, however, be noted that the sentencing reduction is part of the enforcement phase and it is doubtful whether it will be considered part of the "proceedings" in the sense of Art. 68(3).

With regard to the interest a victim may have in participating in such proceedings, the victim may want to participate also in these proceedings with a view to exercising a control function. On the other hand, as has already been noted, victims do not have the right to influence directly the extent of the sentence[993] and this may also be true for the eventual reduction of sentence.

It might be important for victims to be informed of the fact of an early release for psychological and security reasons. Considerations should be given to the incorporation of a notification rule into the provisions of the Court that would provide for the

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[992] See **Amnesty International**, Cour Pénal Internationale, Fiche d'information 6, London (2000). At page 2; see also **Beigbeder**, **Y.** (2002). Judging Criminal Leaders. The slow erosion of impunity. The Hague/Londond/New York, Martinus Nijhoff Publishers. At page 132.

[993] See above chapter on sentencing.

notification of the fact that a convicted person will be released early to all victims that have participated in the proceedings.

H. Release hearings

It has been held that participation under Art. 68(3) should also encompass release hearings.[994]

Release hearings may now be held in respect of different kinds of release. One must distinguish between interim release according to Art. 59(5), (6), conditional release under Art. 92(3) and early release according to Arts. 110, 167, 170.

There is no reason why victims should not be allowed to participate in those hearings that concern the release of the accused before the end of the proceedings. Victims have already been allowed to make observations to a request of the Defence to an interim release of the accused in one case.[995]

With regard to release hearings that will be conducted after the conclusion of proceedings, it is doubtful that victims will be let participate according to Art. 68(3). As already mentioned, victims could, however, have an interest in being informed about an early release.

I. Conclusion

In conclusion, it has been shown that the ICC's provisions on victim participation are both innovative and at the same time restricted.

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[994] See **Beigbeder**, **Y.** (2002). Judging Criminal Leaders. The slow erosion of impunity. The Hague/Londond/New York, Martinus Nijhoff Publishers. At page 132.

[995] See PTC I, Situation in the Democratic Republic of the Congo, **The Prosecutor vs. Thomas Lubanga Dyilo,** Decision on the Application for the interim release of Thomas Lubanga Dyilo of 18 October 2006, Case No. ICC-01/04-01/06-586-tEN 30.

One important conclusion from the analysis of provisions and jurisprudence of the ICC is that victims before the ICC do not have a right to a trial and the extent of their influence thereon is generally very limited. The problems arising out of this have already been set out in detail[996]: Focusing on the prosecution of key persons in high-profile positions while domestic criminal justice systems may malfunction can lead to many persons who were also responsible for war crimes getting off without punishment, frequently including the *de facto* assaulters of victims. National amnesties could also lead to impunity. Victims may find the selection of cases which they can influence only marginally unfair and fortuitous and therein see a way to refuse them participatory rights.

The problem of a very limited arrest warrant being issued has already arisen before the ICC which also had the effect of excluding victims from participating.

The problems arising from the very limited opportunities for victims to influence the selection of who and what is prosecuted should not be underestimated.

With regard to the participatory rights of victims in the proceedings, it can be said in summary that the ICC's jurisprudence so far[997] seems to support a broad interpretation of victims' participatory rights. The tendency to interpret the rights broadly relates first of all to giving the notion of "victim" a wide meaning. Second, victims have been awarded participatory rights at different stages of the proceedings.

Decisions such as the 18 January 2008 decision and the appeal of this decision have tried to bring more clarity to and guidelines for victim participation. Nonetheless, many questions concerning victim participation remain controversial and are still pending. Undefined legal terms need to be further clarified. The issue of victim participation at the investigation stage and its implications for the balance of interests, as well as the general problems linked to prejudice and inconsistency with the rights of the accused and with principles of fair trial, still have not been resolved as other of the above mentioned questions. Furthermore, practical issues, such as identification of the applicants, the legal

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[996] See above Chapter on participation in the investigations.

[997] It should not be disregarded that it cannot be spoken of a constant jurisdiction so far, only few decision having been issued.

representation of victims, collective participation of large victim groups and the form and modalities of presentations need to be assessed.

The effect of situation victims potentially losing their victims status once a case is initiated might be hindered by future jurisdiction that does not let victim of a situation participate in the preliminary proceedings anymore, but has not really been addressed.

There are several provisions that can be termed as progressive, such as for instance the comprehensive notification requirements.

On the other hand, it has to be taken into account that victim participation has been shown to be restricted by different factors. First, the structure of the ICC creates limits to victim participation, such as for instance through a general lack of financial support for participating victims[998] or insufficient outreach work. The nature of crimes under international law, which usually have large numbers of victims also fundamentally influences the way in which participatory rights may be developed. This, along with the strategy to let as many victims as possible participate, leads to a group participation effected by legal representatives, without allowing victims to attend and participate personally in the proceedings and to tell their stories in their own words without them being translated into legal language.

As has been shown, many victims have been waiting for their applications to be processed for a long time.

Furthermore, the Statute itself provides for limited participatory rights, and for instance only includes limited rights to question, no comprehensive rights to submit evidence, very limited access to prosecution or defence evidence which may be essential for an appropriate conduct of a case and almost no rights to review or appeal. Most rights may also only be effected through a legal representative.

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[998] Which may show therein that victims are not being funded legal representation or that sufficient protection cannot be provided which may lead to measures as anonymity which again leads to the restricting of participatory rights, see above chapter on legal representation.

As shown above, another factor limiting the participatory rights of victims are the rights of the accused.

Victim participation before the ICC is thus relatively far from granting victims real rights as a party. Some critics go as far as to say that the provisions are made subject to a paternalistic concept because victims are not made true subjects of the proceedings and are not parties to the process.[999]

It should, however, not be forgotten, that the ICC is the first International Criminal Court to take victim participatory rights into account at all, which must be recognised as an important step in and of itself.

In most national civil law jurisdictions, victims enjoy a more active and wide-ranging role than that contemplated in the ICC treaty. In contrast, victim participation in common law systems has not yet been adopted to the same degree as before the ICC. When drawing such comparisons with national systems, it is, however, also necessary to recognise that the ICC, simply by the numbers of victims involved, has to deal with much more complex problems than national courts and that it is understandable that some rights from national models may not be adopted in unmodified form.

Allowing large numbers of persons participate in proceedings will necessarily result in some limits being placed on victim participation. If, as seems to be envisaged, large numbers of victims will be allowed to participate through legal representation, the effect may instead be symbolical for individual persons or indeed be designed to have a symbolic effect generally allowing for a type of control and observation of the proceedings without that single persons could personally take part.

It is rather interesting to examine the extent to which the actual participatory options that victims have correspond with the aims that the ICC on the one hand and the expectations of the victims on the other hand.

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[999] **Rigaux**, **F.** (2003). La condition des victimes de crimes de droit international. Man's Inhumanity to Man. L. C. Vohra, F. Pocar, Y. Featherstoneet al. The Hague, Kluwer Law International. At page 776.

First of all it is to be welcomed that with all the restrictions, victims still have been given a voice for the first time in international criminal law as was always promised. Yet it is open to question how much the modalities of their influence will help achieve the other aims of norm stabilization, reconciliation and truth finding. Whether these aims can be achieved by the type of victim participation provided for at the ICC will surely be closely related to victims' satisfaction or disappointment with the process and its restrictions and the acceptance gained by the ICC as a result of participation.[1000] How exactly the ramifications will effect processes of reconciliation for instance, is not easy to predict and will only become clear in the future. What is certain is that outreach problems or lack of financial support will prove to have negative effects.

Difficulties with the truth finding process may arise when participation is effected by legal representatives. Not letting victims personally "tell their stories" but rather shortening them and translating them into a legal form may portray a rather different version of truth and individual truth and pain may become hidden. Furthermore, the restrictions in the rights to participate especially in the right to a trial, mean that the above mentioned goals may not be accomplished by the ICC alone. Victim participation will at most make a small contribution to reconciliation processes or truth finding. It may even be important to ensure that victim participation does not ultimately prove counterproductive in achieving the aforementioned aims. This is by no means to be understood as an argument against victim participation but only another allusion to the difficulties that victim participation may involve. Finally, the link to reparations that will be established through victim participation must not be forgotten as an important factor in the overall contribution to reconciliation and stabilization.

In view of the desires and needs of victims it should again be noted that the ICC was established first of all for the implementation of collective rights and interests. Even if these also correspond with the interest of victims, the fact that individual interests such as therapeutic healing, story telling, extensive rights of attendance etc. cannot be regarded or at most in few cases, will most probably lead to personal disappointment.

[1000] See also below chapter on the Reputation of the ICC.

In Chapter 6, the author will examine possible alternative mechanisms to suggest solutions to the problems exposed in the foregoing.

CHAPTER 5 - ICC Sections that support victims

There are different sections of the ICC that deal with victims in the sense of supporting and informing them. In this Chapter those sections will be described only in brief[1001] regarding their capacity to facilitate or even encourage victim participation.

Within the Registry the Court has established the Victims Participation and Reparations Section ("VPRS"), the Victims and Witnesses Unit ("VWU") and an independent office, the Office of Public Counsel for Victims ("OPCV"). There are also Field Offices in some countries.

A. The Victims Participation and Reparations Section

The VPRS is not mentioned in the Rome Statute or the Rules.[1002]

The VPRS has outreach responsibilities and will inform victims of their rights relating to participation and reparations in the ICC[1003], and enable them to submit applications to the Court if they wish to do so. It also advises the Public Information and Documentation Section of the Registry on the preparation of victim-related materials as part of the ICC's general programme of outreach and communications.

The VPRS also assists victims in obtaining legal advice and organising their legal representation.[1004] The VPRS is the victims' first point of contact with the Court.[1005] As

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[1001] For a detailed analysis of the Victims and Witnesses Unit see **Ingadottir**, **T.**, **F. Ngendahayo**, et al. (2000). The International Criminal Court. The Witness and Victims Unit (Article 43.6. of the Rome Statute) A Discussion Paper. ICC Discussion Papers. PICT, Ingadottir, Thordis, Romano, Cesare P.R. **1**.

[1002] See merely Regulation 87(9).

[1003] On outreach see above in the Chapter on outreach.

[1004] See regulation 86, see also **Human Rights Watch**, Memorandum to the International Criminal Court (2000).

[1005] See website of the ICC, under "victims and witnesses" the relevant contact addresses are those of the VPRS and the OPCV, furthermore according to an informal statement from the Section it is in charge of disseminating the application forms for participation and reparations and assisting victims to fill them

stated in Regulation 86 the Registry, and within it the VPRS, has many obligations with regard to notification of developments during the proceedings to the victims in order to keep them fully informed.

The VPRS will, similarly to other victim-related institutions, need to make early contact with victims and continue this contact following the conclusion of the proceedings. The VPRS will also require the necessary financial and human resources to carry out its tasks effectively.

In this context there have been consistent calls for adequate staff and resources for the Victims Participation and Reparations Section to enable it to perform its important functions. It has also been noted that it is particularly important that field officers are in place in each situation from the start of an investigation to develop networks and disseminate information on the rights of victims and that additional resources for the VPRS are needed.[1006]

It has to be seen as a positive step that there is a Section at the ICC that deals exclusively with victims participating before the ICC where the staff are well versed with the specific needs and wants of these persons. However, it seems that it should be clearer for victims which functions exactly will be fulfilled by the VPRS and which by other sections. The necessary means for an effective work need to be provided.

B. The Victims and Witnesses Unit

According to Art. 43(6) the Registrar must set up a Victims and Witnesses Unit ("VWU") within the Registry. This Unit shall, in consultation with the Office of the Prosecutor, provide protective measures and security arrangements, counselling and other appropriate assistance for witnesses, victims who appear before the Court and others who are at risk

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in, as well as providing them with all the information necessary for them to exercise their rights under the Rome Statute.

[1006] See **CICC,** Comments on the Proposed Programme Budget for 2007 of the International Criminal Court and other matters (2006). At page 10, http://www.iccnow.org/documents/Commentary_on_2007_Budget.pdf.

on account of testimony given by such witnesses.[1007] The Unit shall include staff with expertise in trauma, including trauma related to crimes of sexual violence.

In contrast to the VPRS, the VWU deals not only with victims but also with victim-witnesses, witnesses and "others". It thus has a far more extensive remit than the VPRS.

The VWU's primary responsibility lies in the protection of victims.[1008] In fact under Art. 68(1) the Court is primary responsible for adopting measures to protect the well being of victims and witnesses. Under para. 4 of the same article, the VWU's responsibility is merely to advise the Court and the Prosecutor on appropriate protective measures, security arrangements, counselling and assistance. However, the letter of Art. 68(4) seems to be at variance with the broad mandate given to the VWU by Art. 43(6) and to the Registrar by Art. 68(1). It has therefore been argued that it is desirable that the provisions of the Rome Statute be interpreted so as to render the VWU a principal actor of the process. Besides acting as advisor to the Prosecutor and Trial Chambers, it should be allowed to provide *propriu motu* protective measures, security arrangements and other assistance for victims and witnesses.[1009]

It is debatable whether these protective and other duties such as counselling and assisting in obtaining medical, psychological and other appropriate assistance[1010] only apply to those victims who appear before the Court for the purpose of testifying as might be understood from the wording of Art. 43(6).[1011] The clear division of the wording in referring to "victims" on the one hand and "witnesses" on the other hand suggests that "to

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[1007] See **Safferling**, **C. J. M.** (2001). Towards an International Criminal Procedure. Oxford, Oxford University Press. At page 291.

[1008] See **Human Rights Watch,** Memorandum to the International Criminal Court (2000).

[1009] **Ingadottir**, **T.**, **F. Ngendahayo**, et al. (2000). The International Criminal Court. The Witness and Victims Unit (Article 43.6. of the Rome Statute), A Discussion Paper. ICC Discussion Papers. PICT, Ingadottir, Thordis Romano, Cesare P.R. **1**. Pp 13 et seq.

[1010] See Art. 43(6), Rules 17, 18. Information in general is not within the remit of the VWU this task is explicitly given to the Registrar.

[1011] See also **Bedont**, **B.** (1999). Gender-Specific Provisions in the Statute of the International Criminal Court. Essays on the Rome Statute of the International Criminal Court. F. Lattanzi and W. A. Schabas. Ripa di Fagnano Alto, Sirente. **1:** 201 f. At page 205.

appear" also includes appearing solely for the purpose of participating. It must also be pointed out that in an annotation made in Rome to Art. 68(1) is was noted that "the protective measures contemplated by this article are intended to be afforded to witnesses, to victims (who are not witnesses) directly connected with an investigation or proceedings before the Court and to other persons who are at risk on account of the testimony given by such witnesses". [1012] A different interpretation would also narrow the applicability too much as it would put victims who do not intend to testify at a disadvantage.

It is also to be hoped that the wording "appear before the ICC" will not be interpreted in the sense of "*while* appearing before the ICC". Assistance and counselling should not be restricted to the short period when victims are in The Hague. Instead, the VWU should come into play in the early investigation phase even if it is only at the request of the Prosecutor and will be needed in the post-trial phase as well.[1013] Of course the wording of the Statute and Rules do not indicate which interpretation is correct, but before the ICTs the Victims and Witnesses Unit (first) mainly coped with witnesses during their stay in The Hague.[1014]

Trial Chamber I has in the *Lubanga* case stated that in the view of the Court, the process of "appearing before the Court is not dependent on either an application to participate having been accepted or the victim physically attending as a recognized participant at a hearing. The critical moment is the point at which the application form is received by the Court, since this is a stage in a formal process all of which is part of "appearing before the

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[1012] See **Ingadottir**, **T.**, **F. Ngendahayo**, et al. (2000). The International Criminal Court. The Witness and Victims Unit (Article 43.6. of the Rome Statute). A Discussion Paper. ICC Discussion Papers. PICT, Ingadottir, Thordis, Romano, Cesare P.R. **1**. At page 19.

[1013] See Ibid. pages 21, 22., 25.

[1014] There was for instance no definition of the term "witness" nor any indication of the time that a person qualified as coming under the supervision of the Unit leaving open in which period of time services where to provide see **Fitzgerald**, **K.** (1997). "Problems Of Prosecution and Adjucation of Rape and Other Sexual Assaults under International Law." European Journal of International Law **8**(4): 638-663. At page 639.

Court". Once a completed application to participate is received by the Court, "an appearance" for the purpose of Art. 43 has occurred".[1015]

It may therefore be hoped that the ICC will favour a broad solution.

Before the ICTY although there were efforts to expand the activity of the Unit beyond the stay of Victims´ and Witnesses´ in the Netherlands[1016], these efforts where clearly restricted. For instance, in the Post-Trial Phase the VWS was responsible for the relocation of witnesses unable to return to their residence after completing their testimony.[1017] However, relocation could not be accomplished by the Unit itself as the Court does not have a territory over which it exercises jurisdiction. The relocation of witnesses and victims therefore requires the cooperation of state parties. Although States have a duty in a general sense to assist the Tribunals in their investigations and prosecutions through Art. 29 including the protection of victims and witnesses[1018], it is not possible when it comes to matters such as relocation of witnesses to single out a particular State that has the obligation to co-operate. Hence, the assistance takes place on a voluntary basis.[1019]

The Victims and Witnesses Unit of the ICC might face similar problems.

A final issue with regard to the word "appear" could be whether this also includes victims that "appear" by proxy through a legal representative. As most victims will not appear

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[1015] Trial Chamber I, Situation in the Democratic Republic of the Congo in **Prosecutor v. Thomas Lubanga Dyilo,** Decision on victim's participation of 18 January 2008, Case No ICC-01/04-01/06, paras. 136 et seq.

[1016] For example, it is said that besides being responsible for the recommendation of protective measures for witnesses the Victims and Witnesses Unit, in close cooperation with a number of Member States, is responsible for the relocation of witnesses who, for reasons of personal safety, cannot return to their homes after completing their testimony, see Seventh Annual Report of the ICTY, para. 221.

[1017] See 6th Annual Report of the ICTY, para. 164 .

[1018] **Lüder**, **S. R.** (1999). Der Schutz von Zeugen im Recht des Jugoslawien-Strafgerichtshofes und im nationalen Recht. Völkerrechtliche Verbrechen vor dem Jugoslawien Tribunal, nationalen Gerichten und dem Internationalen Strafgerichtshof. H. Fischer and S. R. Lüder. Berlin, Berlin Verlag**:** 139 f. At page 140.

[1019] **Sluiter**, **G.** (2002). International Adjucation and the Collection of Evidence. New York. At page 253.

personally[1020] this should be the case, otherwise most victims would be excluded from the services of the VWU. Of course, if victims do not appear personally the amount of assistance they will receive might be limited as most assistance will be given in the period while victims or witnesses are in The Hague. Still, victims might face problems in their place of origin, even if they do not appear before the Court personally.

The task of protection seems to be that of the VWU, not the VPRS. While some of the tasks of the VWU seem to have passed to the VPRS, the extent of this transfer is not clear.

In conclusion, it can be said that the VWU is essential so as not to make victims suffer twice unnecessarily and that it is an essential part of making victim participation possible. Nevertheless, as stated above, most victims will not come to The Hague personally, therefore the VWU will need to set up sub-offices in different locations, or near flash points in order to reach the victims and work effectively.

Over time the precise responsibilities of the VWU and the VPRS will become clearer and close cooperation between these two units will be necessary.

As with all Units, the VWU must have the necessary financial and human resources to carry out its tasks effectively. As the experience of the ICTs shows, the late launch of victim and witness protection programmes can seriously hamper the work of the Court in its early years of operation, when it will be most vulnerable to criticism.

In this regard it has been said that the provision in the proposed budget for 2007 that provides for an increase in field staff to undertake protection and support activities is to be welcomed. It was approved as the needs of victims and witnesses are often long-term, thus, the Unit had to provide long-term strategies, such as the referral of victims to local organisations. While the Unit had indicated that they were looking into long-term referral strategies, immediate needs had not allowed for medium or long term planning. It was therefore unclear whether the increased staffing would be sufficient to ensure a sustainable protection, support and assistance strategy. The Unit's request for additional

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[1020] See above pages 187 et seq.

resources to intensify its efforts to address of relocation the issue with states parties was therefore well founded.[1021]

C. The Office of Public Counsel for Victims

Another important section is the Office of Public Counsel for Victims ("OPCV") which was established on 19 September 2005.[1022]

According to Regulation 81(2) the OPCV basically functions as a wholly independent office. According to sub-regulation 4 the OPCV is to provide support and assistance to the legal representative for victims and to victims, including, where appropriate (a) Legal research and advice; and (b) Appearing before a Chamber in respect of specific issues.

Under regulation 80 of the Regulations of the Court members of the Office may be appointed as legal representatives of victims.[1023] However, there appears to be some confusion about the role of the Office at this point, as Regulation 81(4) of the Regulations of the Court suggests that staff of the office will undertake subsidiary functions and will not act as legal representatives for victims *per se*, this is further spelt out in Regulation 126 of the Regulations of the Registry. This lack of clarity has given rise to concern.[1024] It will remain to be seen what exactly the Role of the OPCV will be therein.

As an independent section, the OPCV could play another important role in allowing victims to participate effectively. It is certainly an innovative institution that should in principle be appreciated. Only time will tell how the OPCV will act and this will also

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[1021] (2006). Comments on the Proposed Programme Budget for 2007 of the International Criminal Court and other matters, CICC. At page 8. http://www.iccnow.org/documents/Commentary_on_2007_Budget.pdf.

[1022] See website in den Regulations of the ICC: „victims and witnesses"→"Legal Representative of Victims"→"Office of public counsel for victims"; http://www.icc-cpi.int/victimsissues/victimscounsel/OPCV.html.

[1023] See also victim booklet informing victims on the role of the OPCV and how to contact the Office, at page 23.

[1024] See **CICC**, Comments on the Proposed Programme Budget for 2007 of the International Criminal Court and other matters. Para. 40.

depend on the resources made available to the Office[1025] and the skills[1026] of individuals for example in representing victims.

D. The ICC field offices

So far the Court operates two field offices, one in Kinshasa and one in Kampala.[1027]

The ICC Field Offices have similar remits as the VPRS, though it is less extensive probably due to much fewer resources.[1028] Criticism has for instance been expressed as to the fact that while the activities of the Court were expanding, there was insufficient investment to ensure that the Court could operate effectively in the field.[1029]

In particular, the draft 2005 budget submitted by the Court failed to provide for field offices and requested inadequate resources for victim protection and outreach. The draft programme budget for 2005 did not request any resources for field offices. Instead, the budget provided for professional staff in The Hague to travel regularly to the field and in many cases to work with staff recruited locally. The need for the field offices was clearly

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[1025] See **Redress**, Ensuring the effective participation before the International Criminal Court, Comments and Recommendations regarding legal representation for victims, London (2005). At page 8 pertaining to the fact that the Office will only be capable of acting independently to the extent that it has a budget that provides it with the freedom and flexibility to act.

[1026] See website of the ICC, "Important questions": The OPCV consists of lawyers and jurists with a wide range of legal expertise and various language skills. As needs arise, OPCV staff members are assigned to situations or cases involving victims. Victims or legal representatives can at any time approach the OPCV to request representation or assistance.

[1027] Addresses are to be found on the official website of the ICC.

[1028] According to the victim booklet the Field Offices can provide copies of the application forms, make arrangements for distribution and collection of application forms, and give advice on where to find help in completing application forms.

[1029] See CICC Submission to the 3rd session of the Assembly of States Parties on the Report of the Committee on Budget and Finance, 20 August, available at www.iccnow.org/documents/asp/papersonaspissues/3rdASP/CICCBudgetTeam_CommentsCBFreport26Aug04.pdf; **Human Rights Watch**, Memorandum to States Members of the Assembly of States Parties, 2 September 2004.

foreseeable in 2005 and had been provisionally estimated at € 885,000 in submissions to the Assembly by the Registrar.[1030]

Still, even if the means are limited the Field Offices are a very important tie between the Court and the countries where the Court is investigating and victims who can be reached much more easily through personal contact then via internet. Hence coordination between the ICC field offices and the institutions of the Court in The Hague are essential among others for effective outreach but also to ensure adequate protection for victims.

E. Conclusion

Before the ICC different important units have been established that serve the needs of victims, some of them also very innovative institutions.

This has to be seen as a positive step. On the other hand a lot more clarity is wanted in what concerns the functions, possibilities and responsibilities as well as the reach of the different units. What still lacks in many places are the necessary financial and human resources to carry out the tasks as wanted.

[1030] **O'Donohue**, **J.** (2005). "The 2005 Budget of the International Criminal Court: Contingency, Insufficient Funding in Key Areas and the Recurring Question of the Independence of the Prosecutor." Leiden Journal of International Law **18**(3): 591-603. pp 598 et seq; as for the 2007 budget see above Chapter on the VPRS.

CHAPTER 6 - External-Factors limiting victim participation

In the previous chapters it has been shown that there are many limitations within the system of victim participation shaped by the provisions on victim participation on the one hand and the financial means that are currently available.

However, it is necessary to go further than that: there may be limitations not only in the structure of the relevant provisions but also in the structure of the Court as such and through its position in a worldwide societal and juridical system.

A. The ICC's reach

Within any given situation, the ICC may only prosecute a very limited number of cases. As already seen, victims have no right to a trial with the consequence that many victims cannot participate in proceedings before the ICC.[1031]

Another limit to participatory rights arises from the fact, that the ICC will only investigate certain situations worldwide and only in respect of certain crimes.

The ICC's limited reach has been criticized but the problem has, so far, not been associated with victim participation.

The scope of the ICC's functions is limited first of all by the principle of complementarity. If there is a country where the jurisdiction is said to function, the national judiciary has primacy over the ICC's jurisdiction unless the ICC finds that national prosecution is a sham or feigned and aims to cover up the crimes instead of prosecuting them. Such a "bad face investigation", however, may be hard or even impossible to prove in countries said to be governed by the rule of law.[1032]

[1031] See above Chapter on participation in the investigations.

[1032] See **Hankel**, **G.** (2003). "Internationale Strafgerichtsbarkeit: Ein Garant für mehr Sicherheit und Frieden oder politische Spiegelfechterei ?" Mittelweg 36 **3**: 77-91. pp. 88 et seq.

Another limiting factor on the ICC's functions is that not all countries, especially some important countries, have not signed the Treaty.[1033] Although Art. 12(2)(a) provides that "the State on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft" provides for the possibility that nationals of non-signatory states can be prosecuted, this is, again not applicable to prosecutions against nationals of non-signatory states that have acted in connection with military operations authorised by the UN for "sustaining or enforcing peace."[1034]

Moreover, the Rome Statute includes the crime of aggression within the jurisdiction of the Court in Art. 5, however, according to Art. 5(2) the Court shall exercise jurisdiction over the crime of aggression only once a provision is adopted in accordance with articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime. A review conference will be held in 2009, seven years from the date upon which the Rome Statute entered into force, during which the matter will be discussed.[1035]

The ICC's limited jurisdiction may be seen as an effect of the power politics of certain influential countries. There has been criticism that there are "double standards" in international affairs for different countries.[1036] This has, in the view of some, already led

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[1033] So far 108 countries have signed, but not, for instance the USA, Russia or Japan, see http://www2.icc-cpi.int/Menus/ASP/states+parties/.

[1034] See **Hankel**, **G.** (2003). "Internationale Strafgerichtsbarkeit. Ein Garant für mehr Sicherheit und Frieden oder politische Spiegelfechterei ?" Mittelweg 36 **3**: 77-91. PP. 77 et seq.

[1035] See Webpage of the ICC at http://www.icc-cpi.int.

[1036] See **Hankel**, **G.** (2003). "Internationale Strafgerichtsbarkeit. Ein Garant für mehr Sicherheit und Frieden oder politische Spiegelfechterei ?" Mittelweg 36 **3**: 77-91. At page 89. See also **Tuckness**, **A.** (2006). The US, the ICC and the demands of Impartiality. Bringing power to justice? : the prospects of the International Criminal Court. J. Harrington. Montréal, McGill-Queen's University press: 141-161. At page 141 et seq.

to the illegal acts being performed in the Iraq but remaining unprosecuted and likely to stay that way in the future.[1037]

In the context of victim participation, the limitations of the ICC mean that because many situations will never be investigated by the ICC, a multitude of victims worldwide will never be able to participate in proceedings before the ICC without there being adequate alternative means to do so. Participation will therefore remain reserved to a handful of victims worldwide which may well be seen as an injustice and inequality.

B. The ICC's reputation

Whether victims will participate in the proceedings will, to a large extent depend on the way in which the provisions on victim participation are interpreted, how victims are treated and how they are integrated into the process.

If the framework for victim participation will indeed, as already claimed[1038], prove to be unworkable and fall short in delivering meaningful participation to victims, this will undoubtedly have a negative effect on the ICC's reputation.Victims' lawyers are currently among those expressing doubt and concern about the workability of the ICC victim participation scheme.[1039]

[1037] See **Kramer**, **R. C.** (2006). The Illegal War on Iraq: The "Role" of the International Criminal Court. Symbolic Gestures and the Generation of Global Social Control. D. Rothe and C. W. Mullins. Lanham, Boulder, New York, Toronto, Lexington Books**:** 87-104. At page 101; see also **Hankel**, **G.** (2003). "Internationale Strafgerichtsbarkeit. Ein Garant für mehr Sicherheit und Frieden oder politische Spiegelfechterei ?" Mittelweg 36 **3**: 77-91.Pp. 77 et seq; as to the problem of potential immunities of North States see also **Beigbeder**, **Y.** (1999). Judging War Criminals. London, St. Martin's Press. At page 148.

[1038] See for instance **Chung, Christine H.** "Victims' participation before the International Criminal Court: Are Concessions of the Court clouding the Promise ?" Northwestern Journal of International Human Rights **6** (3) (2008), pp. 459-545. At page 461.

[1039] See e.g. Victims Rights Working Group, Bulletin, Summer/Autumn 2007, Issue 9: "Sudan victim lawyers recount their experiences with the ICC so far at pages 1,7; see also **Glassborow, Katy**. "Victim participation in ICC cases jeopardized" Africa Report No. 148 (Institute of war and peace reporting) **20** (12) (2007).

The provisions on victim participation must, however, be seen in the bigger context of the overall performance of the ICC. Victims will only come to participate before the ICC if they view the ICC as a just and functional institution. Victims will only come to participate before what they perceive as a credible institution.

The ICC's credibility could certainly suffer under the limited reach of the ICC as a result of the limitations on its operations as described above which may be perceived as unjust.

Second, the ICC's credibility will depend on the way in which the ICC prosecutes the crimes it investigates. The extent of investigations will be determinative as well as the identity of those against whom investigations are undertaken and which way they are carried out.

Interestingly, in 2003, the then newly appointed Chief Prosecutor for the ICC, Luis Moreno-Ocampo, announced that his first investigation would focus on the activities of corporations in Canada, the United States, Great Britain, China, Germany, South Africa, and twenty-three other states who were suspected of helping to finance ethnic violence in the Congo. Ocampo was apparently looking at the role of the international money flow that arguably fuelled the genocide in the Congo, particularly the companies that were involved in the trade of weapons in exchange for locally mined gold and diamonds. Ocampo has said that corporate executives who knowingly trade with perpetrators of war crimes will be prosecuted as "participants in crimes," a move which could have a chilling effect on the business of international corporations worldwide.[1040] This decision was surprising and has been criticized for not concentrating on natural persons.[1041] The Prosecutor's approach is, however, progressive. The ICC's credibility will depend much on whether the Court will be able to reveal complex historical processes and to prosecute those who pull the strings in the overall context.

[1040] See **Glickman**, **S.** (2004). "Victim's Justice: Legitimizing the Sentencing Regime of the ICC: Dorsey and Whitney Student Writing Prize in Comparative and International Law Best Note Award Winner." Columbia Journal of Transnational Law **43**: 229-268. At page 266.

[1041] Ibid.

If the ICC is not able to do this, the institution will be looked upon as a lobbyist of a few, with the consequence that those victims participating in the proceedings are not a representative group of persons. This will, in the end, have a fatal impact on the aims of the ICC. Victim participation by a few that is not accepted by others can and will most probably not have any reconciliatory effects for a country.

Other factors, such as, for instance, the extent of the implementation of victims' rights, will also influence on the Court's credibility.

C. Conclusion

The question of whether victim participation before the ICC constitutes a realistic and workable option for victims cannot be answered solely regarding the provisions on victim participation. A decisive role will also be given to the manner of implementation of the rules. Furthermore, other factors will be very important for the question as to whether the provisions will be accepted and may therefore be implemented in an effective way.

The two most important factors will, as has been shown, be the credibility and reputation of the ICC as its possibilities of outreach. Both points still pose considerable problems.

CHAPTER 7 - Alternatives

With regard to alternatives to the ICC, it should first of all be noted that the ICC was never intended to be a supra-national legal institution nor would it have been accepted as such by most states. It was conceived as a treaty-based international legal institution of last resort that would preserve the primacy of the national legal systems of the contracting parties, while offering a jurisdictional resort of convenience for the Security Council[1042] and for non-party states wishing to avail themselves of the Court's capabilities.[1043]

Another important ancillary function of the ICC is to encourage national jurisdictions to fulfil their international legal obligations. In the minds of some it is implicit that the Court should also provide technical assistance and capacity-building support to the national criminal justice systems in their pursuit of investigations and prosecutions for crimes under international law within the ICC's jurisdiction. [1044]

For the sake of clarity, it is important to note that when speaking of "alternatives" the author will not only examine instruments which might replace the ICC but also and maybe even more for ways to complement this institution.

It has been stated that victims do not benefit from participation and that participation in international criminal trials is not in the victims' best interests. It has been argued not only that victims are not likely to benefit from the right to participate but that, more importantly, their participation places costs on other groups of victims of human rights atrocities. Victim participation would prolong proceedings thus increasing the costs of each prosecution. Increasing the costs of prosecutions would ultimately decrease the number of prosecutions that could be brought thereby negatively affecting the interests of

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[1042] Art. 12(3).

[1043] Art. 13(b).

[1044] **Bassiouni**, **M. C.** (2006). "The ICC - Quo Vadis?" Journal of International Criminal Justice **4**: 421-427. At page 422.

other victims and the international community.[1045] The author is, however, of the opinion that this is not a valid argument because the needed alternatives are not at hand. A complete exclusion of victims from partaking is not a solution to the fact that the current situation has its limitations. As stated initially, the author will therefore not only examine instruments which might replace the ICC but also and maybe even more for ways to complement this institution.

A. The Trust Fund

One way to complement or supplement the ICC's operation as regards those victims who may not participate in the ICC proceedings because of the limited range of prosecutions, especially the so called "victims of a situation" could be to defer them to the Trust Fund.

However, this would only be possible if one assumes that also victims may apply to the Trust Fund who have not participated in the proceedings before the ICC.

The Trust Fund for Victims operates under the legal framework of the Court's Statute, Rules of Procedure and Evidence, and Regulations of the Assembly of States Parties ("ASP"). A Trust Fund for Victims is provided for in Art. 79 of the Statute. How the wording of Art. 79 is to be interpreted is not clear - this provision is open to a range of possible interpretations in terms of the scope of operations of the Trust Fund. One possible interpretation would only allow for the Trust Fund to implement orders of the Court involving victims who have appeared before the Court. Another interpretation would allow for a role for the Trust Fund in defining who should benefit, including

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[1045] See **Trumbull, Charles P.** "The victims of victim participation in international criminal proceedings." Michigan Journal of International Law **29**(277) (2008): pp. 777-826.At page 779, see also pp. 804 et seq.

victims that have not participated in Court proceedings.[1046] This topic has, however, proved controversial.[1047]

Even if the Trust Fund were to accept applications from victims that have not participated in proceedings before the ICC beforehand, it is still doubtful that reparations, maybe also only collective reparations[1048] will be an adequate alternative to victim participation. Reparations and especially collective reparations can not achieve the same aims as victims participation. Monitoring the proceedings in the sense of having a control over it for instance is of course not possible through reparations.

However, if victims are not allowed to participate, the Trust Fund could be a possible consolation. The ICC should however not be tempted to rely too heavily on this option. It is submitted that reparation should be a means of complementing participation rather than acting as a substitute for participation.

B. Truth Commissions

Truth Commissions are commissions established to research and report on human rights abuses which have occurred over a certain period of time in a particular country under a particular regime or in relation to a particular conflict.[1049]

More than 20 truth commissions were created between 1974 and 1994.[1050] Those set up by national governments were usually transitional governments (newly established

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[1046] **Wierda**, **M.** and **P. de Greiff** (2004). Reparations and the International Court. A Prospective Role for the Trust Fund for Victims. I. C. f. T. Justice. New York, International Center for Transitional Justice. At page 1.

[1047] For a more comprehensive outlook see **Bottigliero**, **I.** (2004). Redress for Victims of Crimes Under International Law. Leiden/Boston, Martinus Nijhoff Publishers. At pp 231 et seq.

[1048] See **Dwertmann, Eva,** The Reparations System of the International Criminal Court, its implementiation, possibilities and limitations, forthcoming.

[1049] See at http://www.usip.org/library/truth.html. The United States Institute of Peace (USIP) is an independent non partisan national institution established and funded by the congress.

[1050] **Avruch**, **K.** and **B. Vejarano** (2002). "Truth and Reconciliation Commissions: A Review Essay and Annotated Bibliography." The Online Journal of Peace and Conflict Resolution(4.2): 37-76. At page 37.

democracies) which sought to "present a formal accounting of the violence, crimes and civil and human rights abuses of the previous regimes."[1051]

I. Aims and purposes of Truth Commissions

The question of the aims and purposes of Truth Commissions is important to be able to assess the extent to which these aims correspond to or are different to those of Criminal Courts, especially the ICC.

National "truth commissions" of one kind or another have thus far had a variety of aims and functions and their goals and accomplishments have varied greatly from country to country, depending upon the specific historical context of the country.[1052] Still, truth commissions have some generally similar goals, insofar as they are usually guided by the quest for restorative justice.[1053]

The first general aim of truth commissions appears to be to investigate officially and provide an accurate record and analysis of the broader pattern of abuses committed during repression and civil war.[1054] It is inherent in such investigations that there should be

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[1051] See **Knoops**, **G. J.** (2006). Truth and reconciliation models and international tribunals: a comparison. Symposium on "The Right to Self-Determination in International Law", The Hague.

[1052] **Pinto**, **M. C. W.** (2003). Truth and consequences or truth and reconciliation? Some thoughts on the potential or official truth commissions. Man's Inhumanity to Man. Essays on International Law in Honour of Antonio Cassese. L. C. Vohra, Y. Featherstone, O. Fourmyet al. The Hague, Kluwer Law International. At page 706; see also **Eisnaugle**, **C. J. N.** (2003). "An International Truth Commissions: *Utilizing Restorative Justice as an Alternative to Retribution*." Vanderbilt Journal of Transnational Law **36**(1): 209-242. At page 222.

[1053] **Henry J. Steiner**, Introduction to Human Rights Program, Harvard Law School and world peace foundation, Truth Commissions; A comparative assessment, an interdisciplinary discussion held at Harvard Law School in May 1996 1, 7 (1997); at 7. see also **Pinto**, **M. C. W.** (2003). Truth and consequences or truth and reconciliation? Some thoughts on the potential or official truth commissions. Man's Inhumanity to Man. Essays on International Law in Honour of Antonio Cassese. L. C. Vohra, Y. Featherstone, O. Fourmyet al. The Hague, Kluwer Law International. At page 706; see also **Parmentier**, **S.** (2001). The South African Truth and Reconciliation Commission. Towards Restorative Justice in the Field of Human Rights. Victim policies and criminal justice on the road to restorative justice. E. Fattah and S. Parmentier. Leuven, Leuven University Press**:** 401-429. At page 421.

[1054] See **Reddy**, **P.** (2004). "Truth and Reconciliation Commissions Instruments for Ending Impunity and Building Lasting Peace." UN Chronice Online Edition **4**.; see also **Henry J. Steiner**, Introduction to Human Rights Program, Harvard Law School and world peace foundation, Truth Commissions; A comparative assessment, an interdisciplinary discussion held at Harvard Law School in May 1996 1, 7 (1997). At page 7.

hearing of victims and perpetrators. In that sense, a truth commission can also be seen as a non-judicial approach to achieve some form of justice for victims as it provides a forum for victims (as well as perpetrators) to give evidence of human rights abuses.

In this process, victims are given the opportunity to tell their stories, which can be therapeutic.[1055] The recording of victims' stories, like the statements and confession of the perpetrator, then leads to the establishment of "truth". [1056] Wrongs that have often been committed in cooperation with States, that have been concealed and denied are then acknowledged by the State and its citizens in order to prevent distortion and or collective forgetting and ultimately a repetition of what preceded the commission.[1057]

Confronting the perpetrators with the truth and the interaction involved in so doing is also designed, it is suggested, to foster understanding by each of the other. This empathy, which is the foundation for atonement, is then seen to lead to forgiveness and finally, to reconciliation.[1058] Thus, reconciliation as opposed to victimization or at least facilitating an individual and a collective reconciliation process, can indeed be viewed as one of the important goals of truth commissions.[1059] Among other things, reconciliation helps to ease a state's transition from civil war and unrest toward a more participatory form of government.

[1055] See **Pinto**, **M. C. W.** (2003). Truth and consequences or truth and reconciliation? Some thoughts on the potential or official truth commissions. Man's Inhumanity to Man. Essays on International Law in Honour of Antonio Cassese. L. C. Vohra, Y. Featherstone, O. Fourmyet al. The Hague, Kluwer Law International. At page 712.

[1056] See **Cassese**, **A.** (2003). International Criminal Law. Oxford, Oxford University Press. At page 10.

[1057] **Klumpp**, **G.** (2001). Vergangenheitsbewältigung durch Wahrheitskommissionen - das Beispiel Chile. Berlin, Berlin Verlag, Nomos Verlagsgesellschaft. Pp 2 et seq.

[1058] See **Eisnaugle**, **C. J. N.** (2003). "An International Truth Commissions: *Utilizing Restorative Justice as an Alternative to Retribution*." Vanderbilt Journal of Transnational Law **36**(1): 209-242. At page 223; see also **Knoops**, **G. J.** (2006). Truth and reconciliation models and international tribunals: a comparison. Symposium on "The Right to Self-Determination in International Law", The Hague.

[1059] **Cassese**, **A.** (2003). International Criminal Law. Oxford, Oxford University Press. At page 10; see also **Pinto**, **M. C. W.** (2003). Truth and consequences or truth and reconciliation? Some thoughts on the potential or official truth commissions. Man's Inhumanity to Man. Essays on International Law in Honour of Antonio Cassese. L. C. Vohra, Y. Featherstone, O. Fourmyet al. The Hague, Kluwer Law International. At page 710.

In additional, Truth or Truth and Reconciliation Commissions (TRC) can, by means of their report, directly or indirectly contribute to reparations of victims.[1060]

As can be seen from the aforementioned objectives, Truth Commissions do have a different focus than Tribunals. They do not provide for prosecution and punishment but have much better means of establishing a more comprehensive view of "truth" or history. An approach based solely on criminal law cannot yield a comprehensive picture of what happened.[1061] As stated before, criminal law marks a bright line between the parties, labelling one as the victim, the other as the wrongdoer. [1062] A process that selects and filters information on this basis may not be suitable for the task of capturing the complexities, nuances and ambiguity of the larger historical picture.

Of course, the truth covered through an amnesty process may be incomplete aswell and not necessarily empower victims.[1063] Nevertheless, a Truth Commission will offer a different approach to the topic as a Criminal institution.

Furthermore, in contrast to Criminal Trials the idea of Truth Commissions is also more likely to target the individual needs of victims and allow room for story telling, personal confrontation etc. Truth commissions thereby offer a larger number of victims the opportunity to participate while recounting the wrongs committed against them in a more comfortable and supportive setting.[1064] Truth Commissions may give victims the centre stage usually reserved for wrongdoers in conventional justice processes.[1065]

[1060] **Pinto**, **M. C. W.** (2003). Truth and consequences or truth and reconciliation? Some thoughts on the potential or official truth commissions. Man's Inhumanity to Man. Essays on International Law in Honour of Antonio Cassese. L. C. Vohra, Y. Featherstone, O. Fourmyet al. The Hague, Kluwer Law International. At page 710.

[1061] See **Klumpp**, **G.** (2001). Vergangenheitsbewältigung durch Wahrheitskommissionen - das Beispiel Chile. Berlin, Berlin Verlag, Nomos Verlagsgesellschaft. At page 2.

[1062] See **Osiel**, **M.** (1997). Mass atrocity, collective memory, and the law. New Brunswick, New Jersey, Transaction Publishers. At page 129.

[1063] See more comprehensively **Du Bois-Pedain, Antje**. Transitional Amnesty in South Africa, Cambridge, Cambridge University Press, 2007. At pages 340 et seq.

[1064] **Nowrojee**, **B.** (2005). "Making the invisible war crime visible: post-conflict justice for Sierra Leone's rape victims." Harvard Human Rights Journal **18**: 85-105. at page 103; **Harrington**, **J.**, **Milde**, **Michael** and **R. Vernon**, (2006). Introduction. Bringing power to justice? : the prospects of the International

With regard to the goal of reconciliation, Truth Commissions could have advantages in achieving this goal as, unlike the ICC, they do not also aim to achieve the punitive goals of retribution und deterrence.

Moreover, some proponents of restorative justice believe that face-to-face problem solving is important because the consequences of settling conflicts through anonymous third parties, as in criminal proceedings, could be destructive.[1066]

Ultimately in contrast to the ICC which is focused on those who bear the greatest responsibility for wrongdoing, a Truth Commission can also examine the responsibility of groups instead of persons.

II. Truth Commissions and their relationship to the ICC

As stated above, there is disagreement over whether victims wish primarily to see the conviction of the perpetrators or to achieve reconciliation.[1067] Accordingly there are also different opinions on the question of whether in the international context, a truth commission should be established and what sort of relationship such a Commission should have to the ICC. The basic question is whether such a forum should replace the ICC or simply supplement it. The ICC Statute fails to provide guidance on the question of the ICC's relationship to Truth Commissions.[1068]

Criminal Court. J. Harrington. Montréal, McGill-Queen's University press:1 et seq. At page 15; critical as to the burden imposed on victims by the fact that the ultimate aim of the Truth Commission's process is not conviction and sentence, but amnesty see **Du Bois-Pedain, Antje**. Transitional Amnesty in South Africa, Cambridge, Cambridge University Press, 2007. At pages 254 et seq.

[1065] **Leman-Langlois, Stéphane.** "Mobilizing Victimization: the Construction of a Victim-Centered Approach in the South African Truth and Reconciliation Commission", Criminologie **33** (1)(2000): pp. 145-166. At page 149.

[1066] See **Eisnaugle**, **C. J. N.** (2003). "An International Truth Commissions: *Utilizing Restorative Justice as an Alternative to Retribution*." Vanderbilt Journal of Transnational Law **36**(1): 209-242. At page 214.

[1067] See above Chapter on victims' needs.

[1068] See **Roche**, **D.** (2005). "Truth Commission Amnesties and the International Criminal Court." British Journal of Criminology **45**: 565-580. At page 565.

It has been feared that the ICC could be misinterpreted, as foreclosing the use of truth commissions.[1069] It has been stated that one worry about entrenching the ICC as a retributive mechanism of moral accounting in international society is the delegitimatization of alternative models such as truth commissions. Moral and political values and goals other than retributive justice might be marginalized or ignored.[1070]

For those who believe that an international truth commission should be established to replace the ICC, it has been argued that such a forum would bring an end to cyclical violence by focusing on the restoration of the victim, the offender and the community where the harm took place, rather than retribution. They suggest that responding to violence with retributive means has always and always will lead to further violence, this time against the offender, through the punishment handed down. Thus, in order to break free from cycles of violence and vengeance, alternative methods are necessary for dealing with international human rights crimes and conflicts to those currently in place, i.e. the ICC and other retributive legal systems or armed conflict respectively. Like the ICC, an international truth commission could be set up and run through the United Nations. This forum would, however, allow countries the opportunity to take deliberate steps toward peace rather than resort to traditional, adversarial responses to international crime and conflict.[1071]

It has further been stated that in fact the ICC could exist alongside a (national) truth commission[1072] but only if the truth commissions had priority over ICC prosecutions, that is, if the ICC deferred first to the truth commission in the first instance and waited to

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[1069] See **Villa-Vicencio, Raul.**(2000) "Why Perpetrators should not always be prosecuted: Where the ICC and Truth Commissions mett", Emory Law Journal **49**: pp. 205 et seq. At page 205.

[1070] See **Lu**, **C.** (2006). The International Criminal Court as an Institution of Moral Regeneration: Problems and Prospects. Bringing power to justice? : the prospects of the International Criminal Court. J. Harrington. Montréal, McGill-Queen's University press: 191-209. At page 367.

[1071] **Eisnaugle**, **C. J. N.** (2003). "An International Truth Commissions: *Utilizing Restorative Justice as an Alternative to Retribution*." Vanderbilt Journal of Transnational Law **36**(1): 209-242. At page 213.

[1072] Notabene a Truth Commission styled like the South African Truth Commission including but not guaranteeing amnesty .

prosecute only those who failed to participate or who were refused amnesty.[1073] If on the other hand the ICC was privileged over truth commissions, which is likely to be the case, and the truth commissions would only operate after or alongside ICC prosecutions, the work of the commission could be severely undermined. At the same time such an approach could bolster the legitimacy of the ICC, by providing a principled basis for the exercise of prosecutorial discretion and assist the truth commission by encouraging more perpetrators of serious crimes to apply for amnesties, and divulge their secrets in the process.[1074]

As the ICC was neither willing nor able to serve as a complete substitute for domestic courts, this might lead advocates of the ICC to acknowledge some role for truth commissions. However, if truth commissions were only given a secondary role, serving only the function of listening to and recording victims' stories, responding to their needs and/or working towards reconciliation, they would not be able to accomplish their full tasks.

The first problem with the concept of truth commissions is that they are to offer amnesty in exchange for truth, at the same time threatening with prosecution. If now the ICC had already prosecuted beforehand, the only threat remaining would be that of domestic prosecutions which is usually no threat at all, there is no incentive for perpetrators to participate anymore. Another derogation for a truth commission would be that a preceding ICC process would undermine the legitimacy and meaningfulness of a truth commission in that way that the ICC by selecting only few perpetrators would create the impression that the Truth Commission was for exercising "secondary jurisdiction". A signal would be sent that the ICC dealt with the most important cases and left the less serious or less significant cases for truth commissions thereby giving truth commissions a

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[1073] See **Llewellyn**, **J. J.** (2004). Justice To The Extent Possible - The Relationship between The International Criminal Court and Domestic Truth Commissions. The Highway to the International Criminal Court: all roads lead to Rome. H. Dumont and A.-M. Boisvert. Montréal, Les Editions Thémis**:** 327-335. At page 327, in favour of such a cooperative approach see also **Roche**, **D.** (2005). "Truth Commission Amnesties and the International Criminal Court." British Journal of Criminology **45**: 565-580. Pp. 565 et seq.

[1074] **Roche**, **D.** (2005). "Truth Commission Amnesties and the International Criminal Court." British Journal of Criminology **45**: 565-580. pp. 565 et seq.

reputation for dealing out second rate justice. Such processes before Truth Commissions would thus be rendered little more than an opportunity for victims to tell their story. This, in and of itself, might offer some comfort to victims, but it would not offer them the truth about what happened to them or their loved ones and about who was responsible for it. Ultimately, giving priority to the pursuit of prosecutions and punishment would undermine the fragile peace and the very chance for democratic transition.[1075] References have also been made to the fact that truth commissions do not need to pose a challenge to accountability, for they do not prejudice the subsequent application of the criminal law. Indeed, truth commissions might facilitate accountability by serving as precursors to the adoption of measures of accountability that may include reparations, restitution, civil remedies, lustration laws, and even criminal prosecutions. [1076]

Another approach is to adopt from the principle that impunity is never acceptable and that removing expectations of impunity for serious crimes under international law prosecution is of the highest importance and blanket amnesties could therefore never warrant deference - to accept a blanket amnesty would be for the ICC to "succumb to blackmail".[1077] Especially with view to crime prevention truth commissions can only act as a "second-rate option" in comparison to the imposition of criminal sanctions. The prosecution of crimes is furthermore an imperative of elementary justice.[1078] Under this view, general amnesties for crimes under international law would be impermissible under customary international law.[1079]

[1075] See **Llewellyn**, **J. J.** (2004). Justice To The Extent Possible - The Relationship between The International Criminal Court and Domestic Truth Commissions. The Highway to the International Criminal Court: all roads lead to Rome. H. Dumont and A.-M. Boisvert. Montréal, Les Editions Thémis**:** 327-335. At page 327.

[1076] **Sadat**, **L. N.** (2002). The International Criminal Court and the Transformation of International Law: Justice for the New Millenium. Ardsley, New York, Transnational Publishers. At page 53.

[1077] See for instance, **Orentlicher, D.** (1991) Settling Accounts: The Duty to prosecute Human Rights Violations of a Prior Regime, 100 Yale L.J. 2537, 2547-49 (1991). At page 1448.

[1078] See **Klumpp**, **G.** (2001). Vergangenheitsbewältigung durch Wahrheitskommissionen - das Beispiel Chile. Berlin, Berlin Verlag, Nomos Verlagsgesellschaft. At page 344.

[1079] See **Werle**, **G.** (2005). Principles of International Criminal Law. The Hague, TMC Asser Press. At page 65.

What has been concluded from this statement is dissimilar: Most scholars have favoured, and even advocated, adoption of the accountability paradigm in one form or another. The strongest proponents of this view support not only the utility of criminal trials, but suggest a duty under both customary international law and treaties to try offenders or extradite them to jurisdictions where they will be tried. There are also those that feel very strongly that prosecution is the sole appropriate response.[1080]

Others even if they oppose impunity, are of the opinion that it is important to clarify at the outset that there is no inherent hostility or contradiction between the objectives of the ICC and truth and reconciliation efforts *per se*. Where used to supplement criminal investigations and prosecutions, truth commissions offer many important benefits that are not provided by prosecution alone.[1081]

Thus, in order to retain the benefit of truth commissions, a combination of the different institutions would be desirable, provided it is politically practicable.

This approach allows for deference to a national programme whereby only those most responsible are prosecuted and low-level offenders are dealt with by non-prosecutorial alternatives (truth commissions), giving truth commissions a subordinate role. Supporters of this approach consider it nevertheless possible that even if the basic argument is that the ICC, given its mandate, must generally insist on prosecution, that there may still be exceptional circumstances where it would not be in the interests of justice to interfere with a reconciliation mechanism, even though that mechanism falls short of prosecution of all offenders.[1082]

[1080] See for instance , **Orentlicher, D.** (1991) Settling Accounts: The Duty to prosecute Human Rights Violations of a Prior Regime, 100 Yale L.J. 2537, 2547-49 (1991). At page 1448.

[1081] See **Robinson**, **D.** (2003). "Serving the Interests of Justice: Amnesties, Truth Commissions and the International Criminal Court." European Journal of International Law **14**(3): 481-505. Pp 481 et seq; see similarly **Klumpp**, **G.** (2001). Vergangenheitsbewältigung durch Wahrheitskommissionen - das Beispiel Chile. Berlin, Berlin Verlag, Nomos Verlagsgesellschaft. Pp 2 et seq.

[1082] See **Robinson**, **D.** (2003). "Serving the Interests of Justice: Amnesties, Truth Commissions and the International Criminal Court." European Journal of International Law **14**(3): 481-505. Pp 481 et seq.

Sierra Leone is one of the only places in which the international community has set up both a truth commission and a court in a post-conflict setting[1083]; utilizing both institutions concurrently has already had both positive and negative effects for the country, raising crucial questions and setting important precedents for future conflict resolution scenarios.[1084] The Truth Commission and Court there agreed to operate independently and not to share information on cases or investigations so that each would receive information confidentially. The simultaneous operation of both institutions revealed their complementarities, but also some of the difficulties and confusion that can arise.[1085]

As can be seen from the manifold views on this topic, it will be a major challenge for the ICC to find an acceptable and workable solution. The drafters were already ambiguous in the Preparatory Commission and failed to provide a solution in the Statute and thereby allowing the Court to develop an appropriate approach when faced with concrete situations.[1086]

In view of the author, there have not yet been any convincing solutions to punishing grave crimes and there is a demand to end impunity. But as has been rightly stated the kind of crimes that will be prosecuted before an international Court do not only have a juridical dimension and are not compassed in all their facets by a juridical solution: it may be

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[1083] See **Schabas**, **W. A.** (2005). Reparation practices in Sierra Leone and the truth and reconciliation commission. Out of the ashes. K. De Feyter, S. Parmentier, M. Bossuyt and P. Lemmens. Antwerpen, Intersentia**:** 289-308. at page 295; see also **Mani**, **R.** (2005). Reparation as a component of Transitional Justice. Out of the ashes. K. De Feyter, S. Parmentier, M. Bossuyt and P. Lemmens. Antwerpen, Intersentia**:** 53-82. at page 56; as for Bosnia the establishment has long been opposed, it seems, however, that now the ICTY has dropped its opposition to a draft law in the Bosnuan parliament that would create a commission, see **Bantekas**, **I.** and **S. Nash** (2003). International Criminal Law. London, Cavendish Publishing. At page 10; see also **Stover**, **E.** (2005). The Witnesses. War Crimes and the Promise of Justice in The Hague. Philadelphia, University of Pennsylvania Press. At page 116.

[1084] **Nowrojee**, **B.** (2005). "Making the invisible war crime visible: post-conflict justice for Sierra Leone's rape victims." Harvard Human Rights Journal **18**: 85-105. At page 85.

[1085] See **International Center for Transitional Justice**, The Sierra Leone Truth and Reconciliation Commission: Reviewing the first year (2004).

[1086] **Robinson**, **D.** (2003). "Serving the Interests of Justice: Amnesties, Truth Commissions and the International Criminal Court." European Journal of International Law **14**(3): 481-505. At page 483.

necessary to punish at the present time still this is not adequate.[1087] Thus, alternative solutions should always be kept in mind, all the more as the ICC itself is not a flawless institution and is been criticized for many points.

The author therefore favours a solution that principally turns against impunity but which would still allow for truth commissions alongside the ICC and above all which would be open to exceptions where national solutions prove to be more promising than prosecution by the ICC.

Support should thus be given to the establishment of Truth commissions alongside the ICC. Truth commissions can indeed supplement prosecutions as a valuable means of giving a voice to victims, building a comprehensive record of events, patterns and causes, providing a meaningful official and societal acknowledgment, promoting reconciliation, facilitating compensation, educating the public and making recommendations for the future. Still, there is a well-founded fear that if Truth Commissions cannot attract with amnesties and threaten only with national prosecutions their work will not be successful and therefore counterproductive because those who participate in the will be dissatisfied. As has been rightly indicated, a badly-run truth commission can be worse than none at all. [1088] Still, this is no reason, not to provide for such commissions. It should rather be remembered how the ICC and Truth Commissions can work effectively together. Furthermore, thought should be given if not in some cases the ICC may operate only after a Truth Commission has already done its work.

Furthermore, if a Truth Commission is working parallel or prior to the ICC certain problems might arise which will require solutions: First of all, there is an issue about the confidentiality of information given before the Truth Commission, especially regarding the use of self-incriminating evidence adduced before the Truth Commission.

[1087] See **Hannah**, **A.** and **K. Jaspers (**1993). Briefwechsel 1926-1969 at page 90. cited according to **Paech, N.** (2002). Sinn und Missbrauch internationaler Strafgerichtsbarkeit. Blätter für deutsche und internationale Politik**4**: 440 et seq. At page 441.

[1088] **Mani**, **R.** (2005). Reparation as a component of Transitional Justice. Out of the ashes. K. De Feyter, S. Parmentier, M. Bossuyt and P. Lemmens. Antwerpen, Intersentia**:** 53-82. At page 61.

In sum, the ICC cannot but find a solution to the modalities of dealing with truth commissions. The modalities of such cooperation should be institutionalised in some way, even if it is necessary for the ICC to decide on this matter on a case-by-case basis.

As the topic is as yet completely unresolved, it can only be hoped that the ICC will not, either by definition or by approach, discourage attempts by national states to come to terms with their past. It would be regrettable if the only approach to deal with gross human rights violations would be in the form of trials and punishment. Every attempt should be made to assist countries to find their own solutions provided that there is no blatant disregard of fundamental human rights.[1089] At this point it should be kept in mind that the ICC should not be seen as giving a complete "voice" to victims, which is the impression that one sometimes gets from the self-portrayal of the Court and especially from its description in academic literature. It will be necessary to explore alternatives such as truth commissions legally as well as factually, as concerns for instance financial support.[1090]

III. Experiences with Truth Commissions

If TRCs are proposed as an alternative, on the basis of experiences with national TRC's there should be at least short examination of how successful those commissions really are or have been. It should, however, not be forgotten how different these commissions have been in their arrangements.

It has been argued that truth commissions have thus far had a generally positive effect, "often reducing tension and increasing national reconciliation, and perhaps increasing the

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[1089] See also **Boraine, Alex**. A Country Unmasked: South Africa's Truth and Reconciliation Commission (2000) at page 112.

[1090] At this point it is interesting to see the example of Sierra Leone: The disparity in funding between the Special Court and the Truth Commission in Sierra Leone is a good example of the likelihood of funding and resource inequalities. The estimated budget of the Special Court over three years is 114 million USD (Amnesty International News service, AFR 51/003/2001, "Sierra Leone: the international community's resolve to end impunity must be strengthened" (24 April 2001). In contrast, the Truth Commission has a total estimated budget of 9.98 million USD (Human Rights Watch, "The Jury is still out: A human rights watch Briefing Paper on Sierra Leone" (11 July 2002). This disparity is even more stark given that the Special Court is intended to prosecute only those few individuals most responsible for the serious violations of international law.

understanding of and respect for human rights issued by the general public and political leads alike."[1091] Still, some points have been debated very controversial.

The strong victim-based orientation of truth commissions has been looked upon particularly favourably. For instance, it has been said of the Chilean version of truth commissions that the process before the Commissions was very victim-oriented and sensible in a way of coping with the victims, furthermore that the almost complete implementation of the Commission's proposals on reparations through the Chilean State as well as the far-reaching acceptance of these reparations was to be welcomed. The Chilean Truth Commission achieved successes that could not have been accomplished through criminal proceedings.[1092]

In other Latin American countries, however, the military remained sufficiently powerful to take influence the proceedings, many recommendations made by TRCs there had to be abandoned in the face of strong military opposition.[1093]

About the South African Truth and Reconciliation Commission it has been said that using restorative justice principles to address crime and conflict had proven that focusing on healing could end cycles of violence.[1094]

It has further been shown, that TRCs have indeed enabled a more comprehensive process of truth-finding then criminal trials.[1095] As the principle *"in dubio pro reo"* does not

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[1091] **Sadat**, **L. N.** (2002). The International Criminal Court and the Transformation of International Law: Justice for the New Millenium. Ardsley, New York, Transnational Publishers. At page 54.

[1092] **Klumpp**, **G.** (2001). Vergangenheitsbewältigung durch Wahrheitskommissionen - das Beispiel Chile. Berlin, Berlin Verlag, Nomos Verlagsgesellschaft. At page 340; see also **Marais**, **H.** (1997). "Taschenspielertricks, Ein Kommentar über die Arbeit der Wahrheitskommission." iz3w(220): 23-24. At page 23; **Schröder**, **P.** (1997). ""Wie gut, dass ich endlich angehört werde"." iz3w(220): 25. at page 25.; **Möller**, **C.** (2003). Völkerstrafrecht und Internationaler Strafgerichtshof - kriminologische, straftheoretische und rechtspolitische Aspekte. Münster, LIT Verlag. At page 166.

[1093] **Goldstone**, **R.** (1999). Healing wounded People - War Crimes and Truth Commissions Verletzte Menschen heilen - War Crimes and Truth Commissions. Karlsruhe, C.F. Müller. At page 15.

[1094] **Eisnaugle**, **C. J. N.** (2003). "An International Truth Commissions: *Utilizing Restorative Justice as an Alternative to Retribution*." Vanderbilt Journal of Transnational Law **36**(1): 209-242. at page 210.

[1095] See **Nerlich, Volker.** Apatheidkriminalität vor Gericht. Der Beitrag der südafrikanischen Strafjustiz zur Aufarbeitung von Apartheidunrecht Berlin Verlag, Berlin, (2001). At pages 333 et seq.

apply before truth commissions, members of commissions have had much more room for manoeuvre, also because the evidentiary standard is lower then in criminal proceedings. Altogether it has been seen to be much easier to generate a complex and exhaustive picture of the past and the injustices inflicted. The victims' readiness to reveal all information available increases accordingly. The historical value of the findings of a truth commission was hence greater than that of the findings of criminal proceedings, especially with regard to their complexity and comprehensiveness. [1096]

It had ultimately shown that, for many, it was already healing and solacing to have exposed their personal story and truth in public. [1097] It was also argued that, amnesty hearings provided a space within which individual acts of reconciliation – statements of forgiveness, empathy, and acceptance – could occur, and did occur.[1098]

It has, on the other hand, also been reported, that many individual victims experienced the Amnesty Committee's proceedings as less than victim-friendly and were dissatisfied with, and sometimes even hostile to, its work.[1099]

What has been very controversial in the context of truth commissions particularly is the issue of amnesties that many states create to accompany such commissions.[1100] Even though the far-reaching amnesties were for some victims or their relatives understandably difficult to accept, it should on the other hand not be forgotten that in many situations

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[1096] **Klumpp**, **G.** (2001). Vergangenheitsbewältigung durch Wahrheitskommissionen - das Beispiel Chile. Berlin, Berlin Verlag, Nomos Verlagsgesellschaft. At page 344 and pp. 358 et seq referring to the Chilean TRC.

[1097] See **Goldstone**, **R.** (1999). Healing wounded People - War Crimes and Truth Commissions

Verletzte Menschen heilen - War Crimes and Truth Commissions. Karlsruhe, C.F. Müller. At page 9.

[1098] See **Du Bois-Pedain, Antje**. Transitional Amnesty in South Africa, Cambridge, Cambridge University Press, 2007. At page 218.

[1099] See **Du Bois-Pedain, Antje**. Transitional Amnesty in South Africa, Cambridge, Cambridge University Press, 2007. At page 217.

[1100] **Cassese**, **A.** (2003). International Criminal Law. Oxford, Oxford University Press. At page 10; **Möller**, **C.** (2003). Völkerstrafrecht und Internationaler Strafgerichtshof - kriminologische, straftheoretische und rechtspolitische Aspekte. Münster, LIT Verlag. At page 164; **Marais**, **H.** (1997). "Taschenspielertricks, Ein Kommentar über die Arbeit der Wahrheitskommission." iz3w(220): 23-24. At page 23; **Schröder**, **P.** (1997). ""Wie gut, dass ich endlich angehört werde"." iz3w(220): 25. At page 25.

comprehensive criminal prosecutions of all crimes was never honestly up for discussion.[1101]

The ICTs like the ICC, are not capable of conducting comprehensive criminal prosecutions in the sense of prosecuting all alleged crimes. As comprehensive prosecution is not really possible, since 2001 there has been increasing frequent discussion regarding the ICTs of the establishment of truth commissions and national criminal proceedings to run parallel to the international proceedings.[1102]

Another problematic point concerning truth commissions is that many of the truth commissions in Latin America failed to win the cooperation of the perpetrators of crimes that had been committed. For example, Chile's TRC possessed no judicial powers. This lack of power meant that the commission could not establish culpability or impose penalties. As a result of this lack of power and consequent lack of cooperation by the perpetrators of crimes, many of the crimes carried out by the Pinochet regime were not mentioned in the official history of the repression.[1103]

Another point that may be seen as problematic are the theological parameters especially of the Southafrican TRC. This TRC best exemplifies how an international truth commission focused on the theological goals of restorative justice would look like and function. Christian values have here been adopted. As religious leaders and churches became increasingly involved in the commission's work, the influence of religious style and symbolism supplanted political and human rights concerns.[1104]

The imposition of Christian values is, indeed, problematic. Especially in countries where other religions or no religion is practiced or in countries where Christian religion has

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[1101] **Möller**, **C.** (2003). Völkerstrafrecht und Internationaler Strafgerichtshof - kriminologische, straftheoretische und rechtspolitische Aspekte. Münster, LIT Verlag. At page 170.

[1102] **Gisvold**, **G.** (1998). A Truth Commission for Bosnia and Herzegovina? Anticipating the Debate. Post-War Protection of Human Rights in Bosnia and Herzegovina. M. O'Flaherty and G. Gisvold. The Hague, Martinus Nijhoff Publishers**:** 241-263. Pp 241 et seq.

[1103] **Eisnaugle**, **C. J. N.** (2003). "An International Truth Commissions: *Utilizing Restorative Justice as an Alternative to Retribution*." Vanderbilt Journal of Transnational Law **36**(1): 209-242. Pp 224 et seq.

[1104] See Human Rights Program, at 20.

played a critical role, references to Christian or religious values should be handled with caution.

A complete processing of all crimes was not possible for any of the Truth Commissions that have existed so far, many victims, also before Truth Commissions therefore did not have the chance to appear and participate.[1105] Only about 4000 victims of the long history of apartheid could for instance tell their stories before the Southafrican Truth and Reconciliation Commission.[1106]

Some have criticized the Southafrican TRC for its lack of direct victim-offender interaction during the life of the TRC, and for the fact that little restitution in the form of monetary reparations was carried out by offenders.[1107]

Others even suggest that TRCs in many cases have proved unable to bring about true reconciliation.[1108]

IV. Conclusion

As shown above, truth commissions have different aims to a criminal tribunal and may fulfil functions that criminal proceedings cannot. The introduction of truth commissions may therefore be desirable if not even necessary especially with view to the needs of victims.

Before such a step may be accomplished, the relation of the ICC to possible truth commissions as their remits need to be clarified and set out.

First of all, it is important that the ICC does not suggest, especially in the context of victim participation, that it can effect a solution on its own. The ICC can only fulfil

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[1105] See **Hartmann/Jarasch**, Der Freibeuter 76, April 1998, at pages 37, 48.

[1106] See **van Zyl**, Journal of international Affairs, spring 1999, at page 647 (657).

[1107] See **Hutchinson & Wray**, Truth Commissions, International Criminal Law Journal (2001): pp. 1-19, at page 6.

[1108] **Cassese**, **A.** (2003). International Criminal Law. Oxford, Oxford University Press. At page 10.

certain functions and only to a certain extent. Alternatives must be kept in mind and consideration must be given to how they may be implemented and provided with financial means etc.

Truth commissions in this context are one, already relatively established means of restorative justice possible alternative.

C. "Grassroot Courts"

Another solution to complement the ICC's work could be found in Grassroot initiatives such as, for instance the "Gacaca" Tribunals in Rwanda. Such solutions will most probably not be appropriate to replace international proceedings or national proceedings but would rather provide a solution for coping with the multitude of cases.

The Gacacas have been described as a kind of mixture of a truth commission and a judicial authority, considering that amnesty would not be accepted in Rwanda.[1109]

Possible advantages of the Gacacas are that they provide a solution that is adapted to the specifics of Rwanda and the conflict in this country. Gacaca justice has also been praised for its attempt to find a solution that is being developed by perpetrators and victims jointly.

On the other hand Gacacas have been criticized for the inadequate education of the judges which leads to certain judicial standards not being guaranteed[1110] and for pursuing inequitable justice.[1111]

[1109] See (2002). Prosecuting Genocide in Rwanda, The Gacaca System and the International Criminal Tribunal for Rwanda, Norwegian Helsinki Committee. At page 22.

[1110] See **Wenke**, **D.** (2002). "Gacaca Rechtsprechung in Ruanda, ein traditionelles Gerichtsverfahren in modernisierter Form Struktur, Probleme und Chance." Wiener Zeitschrift für kritische Afrikastudien **4**(2). At page 39, see also **Hankel**, **G.** (2004). Die Gacaca Justiz. Der Freitag. Berlin., for a detailed analysis of Gacacas see also (2002). Gacaca: A question of justice, Amnesty International.http://web.amnesty.org/library/index/engafr470072002.

[1111] **Corey**, **A.** and **S. F. Joireman** (2004). "Retributive justice: The *Gacaca* Courts in Rwanda." African Affairs **103**: 73-89.

Without going into further detail, it can be said that national solutions even if they are not classical judicial solutions, may indeed complement the ICC and have the advantage of being closer to the people. It has indeed been held that the example of the gacaca courts in Rwanda clearly shows the need for entities suited to the specific context of the conflict and the communities affected it. [1112]

It will, however, remain to be seen how such solutions will be structured and what their advantages or disadvantages may be.

As already mentioned in the context of truth commissions, the international community should, with view to such alternative solutions, in any case be aware of the limited range that the ICC has and not rely upon victim participation in the ICC as a substitute for developing and providing resources for alternative and multiple platforms. The ICC itself then will be assigned to on the one hand serve as a example for instance as for the extent of victim participation, on the other hand the ICC will have to think of ways how to cooperate effectively if necessary.

D. Conclusion

The alternatives enumerated above represent only some of many possibilities, the list is by no means exhaustive. It may be seen from the suggested proposals, that there are not many alternatives, and, that alongside the ICC there are only very limited possibilities for victims to participate in a process of coming to terms with the past even if different approaches are considered.

One result should therefore be that attention has to be turned not only to the ICC and its possibilities but also in the development of alternative platforms.

[1112] See **Rauschenbach, Mina; Scalia, Damien** . "Victims and international criminal justice: a vexed question? " International Review of the Red Cross **90** (870) (2008): pp. 441-459. At page 483.

It is possible to say that the ICC will have to prepare for cooperation with other institutions even if this may pose difficulties. The international community may not rely upon victim participation before the ICC as a substitute for developing and providing resources for alternative and multiple platforms. The establishment of an international criminal court should also not lead to the conclusion that the protection of human rights is a problem firstly or only to be solved through criminal law.

As the aims and the reach of the ICC are limited, particularly with regard to victims rights, alternatives will be needed to complement the work of the Court. Establishing a lasting peace in a country cannot be achieved by the ICC alone. An effective process of dealing with the past has to, at least partly, take place in the place where the crimes have been committed.

Even if cooperation with other institutions may set in the details a difficult task for the ICC, it will have to be thought about solutions.

CHAPTER 8 - Conclusion

I will now return to the original question raised in this theses, which is to which extent the Rome Statute really provides for an instrument that gives victims a new and satisfactory role in international criminal proceedings.

The study has shown, that there is no easy answer to this question and that there are positive as negative aspects to the ICC's participation regime for victims but that a solely positive evaluation of the situation certainly does not capture the rather complex situation.

Reflecting on the historical development, it is important to note that the implementation of participatory rights for victims is indeed a striking development in light of the fact that victims historically appeared primarily as witnesses without an independent role in previous military or *ad hoc* tribunals. That victims are given an independent role at all must be viewed as a success.

Even in comparison with some national regimes, the ICC provides for more progressive solutions, while in other countries, victims are clearly awarded more comprehensive rights.

On the other hand the examination of the aims of the ICC and its provisions on victim participation has disclosed that only very few victims of war crimes worldwide will have the possibility to really come to the ICC and participate in the proceedings. Furthermore it has been shown that victim participation before the ICC will and has already been limited by various factors.

First of all, the aims of victim participation in an international criminal trial must necessarily be seen in the context of the interests and values of the international community. The purposes and interests pursued therewith may coincide with those of the victims but they may very well also diverge, especially where victims want their own personal interests to be given priority. Story-telling or individual healing for instance, will in all likelihood not be the focus of the Court's work.

That the victim may only influence the proceedings in a very limited way in personal and individual terms, is also evident from the provisions. Victims will usually, especially in

cases where many victims want to take part, only participate in groups represented by a lawyer without personally attending the proceedings.

From the Court's jurisprudence so far, there is a clear tendency to interpret the provisions widely and thereby to allow many victims to participate, even at the very early stage of the investigation of situation. Potentially allowing for many victims to participate in the proceedings will, on the other hand bolster the tendency to let victims participate in groups that are represented by a lawyer.

On the other hand, the wide interpretation of victims' rights in the proceedings does not alter the fact, that victims do not have a right to a trial so that many victims may not participate because "their case" is not being prosecuted before the ICC. At least the possibility of participating at the early stage of the investigation of a situation gives victims, at least in theory, the chance to influence the choice of the cases and the crimes that will be prosecuted.

The latest jurisprudence also shows that the tendency to a wide interpretation might well be remodelled soon.

Victims' rights in the proceedings before the ICC do not give them the status of a "party" to the proceedings. Victims' participatory rights are limited in many ways and for instance, only include limited rights to put questions to witnesses or the accused and no or at least a very limited right to submit evidence, very limited access to prosecution or defence evidence which may be essential for the appropriate conduct of a case and almost no rights to review or appeal. Most rights may furthermore only be effected through a legal representative. As seen above, another limiting factor are the rights of the accused.

A grave difficulty and problem in the enforcement of victims' rights is that financial support is only awarded for certain procedural constellations and to a very limited extent. This could lead to the creation of a hierarchy among victims, with only the privileged, educationally or financially, being able to access the Court. Such hierarchies should be avoided by all means.

It has already shown that the processing of victims' applications takes place very slowly, leaving victims to wait for too long.

Decisions such as the 18 January 2008 decision and the appeal of this decision have tried to bring more clarity and guidelines for victim participation. Nonetheless, many questions concerning victim participation remain controversial and the interpretation of the provisions is still open on many points and has been left to the discretion of the Court. On the one hand, this leaves the possibility for progressive jurisprudence and judicial solutions where agreements in the drafting procedure could not be reached. On the other hand conflicting judgements could be a problem, especially when judges of different legal backgrounds are working side by side. This could then give rise to confusion and irritation. Or as seems to happen for instance with regard to the right of victims to participate at early stages in the proceedings, early decisions could raise hopes that will be dashed at a later stage.

The Statute lacks the legal certainty that would be needed for victims to determine if they want to participate or not. In the long run, much more legal certainty will be needed to prevent wrong expectations and to give potential participants a clear idea of what will be awaiting them.

With all their limitations, the provisions on victim participation still seem to be appropriate for giving "victims a voice" in the sense of providing a legal control function and to give them a say at least symbolically. As for the other goals of victim participation such as truth finding or reconciliation, it is still questionable to what extent they can and will be achieved. Victim participation will only be one part in an overall process of achieving these goals but should at least not be enforced in a way that is counterproductive to these aims. Ramifications in the way in which victim participation is effected may have a damaging impact on its success generally.

The achievement of the goals mentioned will also depend on the overall standing that the ICC has in the international community, the ICC as a whole will have to prove its worth.

The standing or reputation the ICC will have, will to a certain extent also depend on the way the ICC will cope and hopefully cooperate with alternative or complementary fora, such as for instance, truth commissions. Even if the ICC maintains retribution and deterrence as its core aims, in a larger context, reconciliation and lasting peace must also be achieved, which will not be possible through the ICC alone. It seems that so far there

are no real alternatives then to punish serious crimes for which prosecution may be required under international law. However, punishment should still not be thought of as a comprehensive concept: The International Community should for instance not be tempted to rely upon victim participation before the ICC as a substitute for developing and providing resources for alternative and multiple platforms that may cope with victims desires and needs much more comprehensively. Especially local solutions that are developed by the parties involved may prove to be more effective and to be more accepted.

The ICC does have the power to clarify and develop the procedural rights of victims and to develop the status of victims towards that of a party. The International Community can also provide the ICC with the necessary means for sufficient protection, outreach work, financing of legal representatives for victims etc.

The ICC can also become an accepted institution that prosecutes on an equal basis all over the world and sets a good example for national jurisdictions, also in the field of victim participation.

There are, however, limits to the possibilities of the Court, as a criminal and international court. Objectification of victims may to a certain extent, be inherent in the legal process and a criminal trial and an international criminal trial may not be the most appropriate context for thorough satisfaction of the rights of victims. Still, this is not a reason to neglect procedural reform. In the view of the author, effective participation should prove to be the best solution while at the same time honestly accepting the limitations of the legal process and clearly communicating these to the victims without discouraging them. The ICC should not be tempted to promise more than it can provide.

At the same time alternative fora and structures should not be ignored.

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